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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs.—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA,

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK AND GEO. E. CLARKE.

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STATEMENT OF THE CASE.

THE PLEADINGS.

This is a suit in equity. The plaintiff below, plaintiff in error here, by his petition claims that he

"Is the absolute owner in fee simple of lots 2 and 3 in section 30, T. 97, R. 34, that the said lots were surveyed by the Government and platted, and the record of said survey and plats were duly returned to the General Land Office at Washington, D. C., and became a part of the records of said office; that said lots were meandered by the government surveyor, and said meander lines run with reference to a lake then existing in part upon said section, and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation be-

tween said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mesne conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake; about 1899 the defendants without the consent of the plaintiff entered into the possession of all the land between the meander line and the lake proper, and are now claiming title to said land, which claim is adverse to title of plaintiff."

"That the plaintiff's title includes all of the land embodied in the south half of said section and his title is complete to all of said land claimed adversely by the defendants."

And he prays,

"That in event the court should determine the plaintifff is not the owner of all of the land included in the south halff of said section that the court then determine the extent off the boundary of the plaintiff's land and that the court decree that the plaintiff is the fee-simple owner to all land between the meander line and the bank and edge of the lake as meandered, as well as the land between the meander line and the south line of section 30, and that title be quieted in the plaintiff and the defendants barred from having any interest or title in said real estate adverse to this plaintiff, and the defendants be enjoined from cutting and removing timber thereon,, and such other relief as may seem equitable and a writ issue removing the defendants from said premises and placing plaintiff in possession."

ANSWERS.

The answers set up

"As to whether the government issued patents to lots two and three and the plaintiff is the owner of said land the defendant asks the Court to require strict proof; as to whether said lots were surveyed and platted by the government and said survey and plats filed in the General Land Office and as to whether said lots were meandered defendant has not sufficient knowledge to form a belief, and denies the same; the defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30, T. 97, R. 34." (Record pp. 2 and 6.)

The answer of Ryan further claims

"That the patent from the United States and the warranty deeds as set forth in plaintiff's petition in describing said land only purported to convey the number of acres in each lot as shown by the government survey and plats, and that neither said patents not deeds purport in any manner to convey the

land embraced in lots 12 and 13, being a part of the land in controversy, and defendant denies that said patent or deeds conveyed any title whatever to the land embraced in lots 12 and 13." (Record p. 3.)

And the answers further set up as to defendant, Ryan, that on March 8th, 1898, the Secretary of the Interior directed a survey of certain unsurveyed land in sections 19, 20, 29, and 30, Township 97, Range 34, and that said lands were surveyed on the 2nd to the 20th days of April, inclusive, of the year 1898.

That thereafter, in August, 1898, Ryan, having established his residence on lots 12 and 13 of this survey of section 30, entered said lots as a homestead and claimed right to them under such homestead entry. (Record p. 3.)

The defendants, Palo Alto County and Hemphill, by their joint answer set up the same survey of 1898, and that lots 11, 14 and 15 of section 30, as shown by this survey, were swamp and over-flow lands included in the grant of 1850 to the State of Iowa; that these lots had been duly selected by the State under that grant, and approved by the Secretary of the Interior (Record p. 6); by supplemental answer, show that the patents had issued to the State of Iowa under the Swamp Land Grant, who had in turn issued patents to Palo Alto County under that grant (Record p. 9); that Hemphill had purchased the lots from the County, and paid a part of the purchase price, and was in possession under such claim of title.

We do not deem it material to set out some other matters contained in the answers.

For the answers in full see Record pages 2 to 7, and pages 9 and 10; also page 98.

REPLY.

The plaintiff by reply set up

"That all of the proceedings with reference to the resurvey of the land and opening the same for homestead was without authority or jurisdiction for the reason that prior theretofore the United States had caused section 30 to be surveyed and platted and thereafter sold and conveyed said land according to the official plat to John A. Anthony; that by said patent the United States parted with all its title to the land in controversy herein." (Record p. 7.)

And makes the same reply as to the proceedings so far as relates to the alleged swamp land. (Record p. 7.)

By further reply he set up the statute of limitations, and title by prescription. (Record p. 10.)

These replies were made to stand to the amendments to defendants' answers above referred to. (Record p. 112.)

It will be observed that plaintiff's averment as to the lands in the patent under which he claims is

"That said lines were meandered by the Government Surveyor, and said meander lines run with reference to a lake then existing in part upon said section; and the plat as made by said Surveyor, and filed for record as aforesaid, shows the meander line to coincide with the shore line of said lake, and shows no reservation between said meander line and the lake."

The facts regarding this survey, plat and meander lines are only contested by defendants under a simple denial of the facts alleged, and a specific denial.

"That such meander lines were run with reference to a lake then existing in part upon section 30, Township 97, Range 24." Defendants do not claim in their answer that the lake shown by the survey, plat and meander lines, was a lake not "necessary" or "proper" to be meandered. No such issue as this is involved in the case.

DECISION.

The trial court found for plaintiff below and plaintiff in error here, as to lots 2 and 3 covered by the patent under which he claims

"Including all the land lying between the government meander line and the high water mark of a certain body of water known as Mud Lake, as well as the land lying between said meander line and the half section line of said section 30, except the land lying under the high water mark, and being covered by the waters of said lake. He is hereby entitled to immediate possession of said premises, and that a writ of removal issue to remove defendant from the possession of said land."

"It is further decreed that the absolute title in fee simple in and to said premises be and the same is hereby established and quieted in the plaintiff, as an absolute indefeasible fee-simple title, and the defendants are hereby estopped from having or claiming any right, title, interest or estate, in said premises, and they are perpetually enjoined from occupying or using said premises." (Record p. 97.)

On appeal the Supreme Court of Iowa held that plaintiff had no right to any other than the land patented to this grantor, bounded on the north by the meander line and denied his right to any land beyond the meander line (Record pp. 126 to 129), and ordered a judgment entered by the trial court accordingly. (Amendment to Record, p. 2.)

Plaintiff in error thereupon sued out a writ of error herein to review such decision of the Supreme Court of Iowa.

THE FACTS.

The Government patent under which plaintiff claims conveys

"Lots numbered two and three of section thirty, in township ninety-seven of range thirty-four in the district of lands subject to sale at Sioux City, Iowa, containing ninety-nine acres and eighty-hundredths of an acre (excess paid as per receiver's receipt No. 2213) according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general. * * * "

"To have and to hold the said tract of land with the appurtenances thereof, unto the said John A. Anthony and to his heirs and assigns forever." (Record p. 120.)

Exhibits B, C. and D offered in evidence by plaintiff are conveyances from the original patentee and his grantees vesting the title to the patented land in plaintiff. (Record pp. 10 and 11.)

GOVERNMENT SURVEY, PLAT AND FIELD NOTES.

The Government plat of the original survey introduced in evidence shows that nearly all of section 30, except lots 2 and 3, covered by the patent under which plaintiff claims, together with large portions of adjoining sections, was meandered.

Plaintiff's land, lots 2 and 3, is on the south side of said section. A fragment of the northwest corner is meandered and surveyed as lot one; the remainder is not subdivided. (Record p. 11. See Exhibits E and F.)

There were two surveys with field notes relating to this section. The first covers the exterior township line upon which section 30 borders on the west adjoining section 25 in the next township on the west. That survey was made July 27, 1855. The accompanying field notes are as follows:

"North between sections 25 and 30, var. 11° 45′ E.

16.43 Set meander post on south side of lake.
Lake bears N. E. and S. W., made mound of earth and sod pit 8 links south.

59.31 Set meander post on north side of lake.

80.00 Set post corner to sections 19, 24, 25, and 30.
Made mound of earth and sod pit 8 links south of post.
Corner in swamp.
Swamp from corner bears E. and W.
Prairie level soil 1st rate, growth grass and weeds."
(Record pp. 120-121.)

From this it appears that the surveyor in 1855 going north from the southwest corner of section 30, a distance of 16.42 chains "set meander post on south side of lake;" and 59.31 chains north "set meander post on north side of lake;" the difference between these two distances, 42.88 chains, or 171.52 rods, shows the width of the lake on the west line of section 30. There was then a lake at that point more than half a mile across measuring from south to north.

The subdivision of township 97, range 34, was made two years later. Beginning July 25, 1857, and completed July 31, 1857.

As to the south line of section 31, the accompanying field notes are as follows:

"West random between sections 30 and 31 var. E. 10° 53'.

74.92 Length of line between sections 30 and 31.
East corrected between sections 30 and 31 var E. 10° 44'.

37.40 Scattering timber bears N. and S.

34.92 Set a quarter section post.
Bearings: Bur O. 10 S. 63 W. 36
Do. 10 N. 53 W. 46

45.00 Leave timber bears N. and S.

64.42 Lake marsh. Set a meander post in mound of turf, Pit E. 8 links.

74.92 Section corner.
Surface level, soil 3rd rate timber oak."
(Record p. 121.)

These field notes show that the north meander line of plaintiff's land, lots 2 and 3, was actually run out and measured, and courses at distances of such meander lines are given. It extends from meander post on the west line of section 30 to like post on the south line of section 30 near southeast corner of the section. (See Record p. 113.)

The other field notes, accompanying the plats of survey of the east and north lines of section 30, are found in the record at page 56. They correspond with the plats, Exhibits E. and F (Record p. 11) and show the whole eastern line of the section to have been meandered on section 29, and that the north line aside from 13.63 chains of the northwest corner of the section was a theoretical line not run out or measured because of the intervening lake at that point. It was of this survey and plat that the Secretary of the Interior said under date of March 8th, 1898, ordering a resurvey:

"From the official plat of said township it appears that the lake extends into four townships, viz: Townships 96 and 97, half a mile to a mile and a half in width." (Record p. 75.)

And of the resurvey under which defendants claim, the

Secretary said, under date of June 25, 1898, approving such resurvey,

"With his report Mr. Barber submitted a plat showing that the land in question is mostly agricultural in character, *with a wet, marshy pond, called Mud Lake, covering portions of sections* 25 and 30, with an outlet going west into Trumbull Lake." (Record p. 76.)

The plat thus submitted by Mr. Barber is defendant's Exhibit 2 (Record p. 73). It shows a lake or pond on section 30 and depicts its actual margin. It shows the lake to be practically ½ mile wide at the west line of section 30, precisely the same as the original survey of the exterior township line made in July, 1855. At the west line of the section and township this lake adjoins the northwest corner of plaintiff's meander lots. North of these meander lots, going north, the margin of the lake runs slightly northeast practically to the middle of the section, thence turning east it runs close to the middle line of the section until its geographical center, whence it runs northeast to within about 40 rods of the northeast corner of the section. At this northeastern extremity of the lake the lake-bed is depicted on the plat as narrow. The accompanying field notes, Exhibit 3 (Record p. 80), say of this northeastern point of the lake "open water of the inlet 50 links wide, thence on solid flat." The bed of the lake, therefore, at that point is depicted by Mr. Barber as two rods wide.

These same field notes say of the bed of the lake at the west line of section 30, "Margin of water. Coarse grass, weeds, fences and muskrat houses *all over Mud Lake* showing uniform shallow water and level bottom. Estimated depth, 1 to 1½ feet." (Record p. 80.)

And regarding Mud Lake at the very time of the resurvey the field notes state

"Proceed to the outlet of Mud Lake in sec. 25 and set instrument in graded road near bridge. Telescope is 9·05 ft. above water level of Mud Lake and 9·02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches *in the pond* would cause water to flow in said outlet, westward and a rise *of two feet would cover the broad, grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

The field notes of this resurvey also show that on the east line of section 30, 45 chains or 180 rods south of the northeast corner Mr. Barber found a well-defined beach. With reference to this point the field notes read: "Leave flat ascend beach 45 feet." (Record p. 81.)

The defendant, Hemphill, testifies in regard to Trumbull Lake mentioned in the field notes of the resurvey:

"I am somewhat acquainted with Trumbell Lake and with the outlet of Mud Lake into Trumbull lake. Mud Lake

is higher than Trumbull Lake. The outlet of Trumbull Lake is in the Sioux River. * * * * It is about half a mile from Mud Lake to Trumbull Lake." (Record p. 85.)

"The Sioux River is about 12 miles from Trumbull Lake." (Record p. 86.)

"That was the general fishing ground in the spring of the year, the outlet between Trumbull and Mud Lake." (Record p. 88.

"We generally fished on Trumbull and Palo Alto Lake. Generally followed the outlet of Mud Lake and fished along there." (Record p. 90.

M. S. GREENE testified for plaintiff:

"Have known Mud Lake since 1871. (Record p. 14.) Have seen the lake two feet higher than it is now (at time of trial in 1890). That was in 1878. There were no weeds and rushes in the Lake proper at that time. (Record p. 15.) * * * * Trumbull Lake is larger and covers a good deal more surrface than Mud Lake, and is a deeper lake. * * * * Trumbull Lake is in Clay County, about a mile and a half from Mud Lake." (Record p. 16.)

JAMES SPAULDING testified for plaintiff:

"I am 60 years old. Live 1½ miles east of Schlosser. Since 1872. Have seen Mud Lake frequently; crossed it on the ice; a sheet of water when I came there in 1872; a mile and a half long and sixty rods wide. Water was two feet higher then than now. Same stage of water kept up pretty well until five or six years ago. There was pond lilies and rice pretty generally growing over the lake. Have caught fish there myself. Have seen the water wash up to the trees along the point that projects into the lake two or three times. (Record p. 16.) The water that comes over section 30 starts on section 36 in Clay County on the south and runs to about 40 yards of the east section line in section 30 in Palo Alto County. (Record p. 17.) The fact is, the only change I have seen there is the country in general is getting dryer; cultivation of the soil and breaking it up absorbs the moisture. (Record p. 19.) There are springs in the lake; one near the east end of the south side out beyond section 30; one on section 20 near Lee Hemphill's; one on section 29 near Alexander Hemphill's; one out in the lake where Schlosser piped from when the lake was dry. He had a tank there on the west side; the outlet of the spring is in the lake." (Record p. 20.)

FRANCIS FITZGERALD testified for plaintiff:

"I am 63 years old. I live 20 rods west of Mud Lake in Clay County, and 1½ miles from Schlosser; came to Clay county in 1871. * * * * The land on the east of the plat marked

'lake' was covered with water in an early day; of late years it is a good deal drier. (Record p. 20.) The depth of water varies at different times of year. I think it has been four or five feet in early days. (Record p. 21.) I think the lake is a mile and a half square at the present time. Is has an outlet at high water. There are some springs; the principal one is in Clay County north of Schlosser's house; I don't know of any other." (Record p. 22.)

NICHOLAS RICE testified for plaintiff:

"In 1882 the water was pretty high. The fore part of the summer it was up in the trees; remained there until in August before it went down. It did not go down below the roots of the trees. It collected along there until it froze up that year. From 1882 to 1890 it averaged along about a rod from the roots of the trees. The portion southwest of the island was generally covered with water up to seven or eight years ago. The eastern portion of the half section was generally covered with water in the spring that receded toward fall. (Record p. 22.) From 1882 to 1890 the body of water which has been indicated as the lake proper was a nice, clear lake. There was practically no weeds or grass in the center of the lake. A few patches around the edges. (Record p. 23.) As the country around becomes cultivated and absorbs the moisture the lake dries up." (Record p. 25.)

J. CROOKSHANK testified for plaintiff:

"Age 69 years Have known Mud Lake since 1868. Have been acquainted with it since that time, and have seen it frequently. (Record p. 25.) There was water all over th south and southwest of the island, and between the island and Schlosser's land in 1868 when I first saw it. I think it was a part of Mud Lake. It was connected with the upper part of the lake. There was no bar between the island and pond at that time. It was all a clear body of water. Could not go from Schlosser's land across to the island in the summer time. * * * * I should judge the water was one or two feet lower now than when I saw it in 1868. Mud Lake is about 1½ miles long, and it might be 80 rods wide. * * * * Mud Lake has been from five to six feet deep to dry. (Record p. 26.) The deepest part of Mud Lake is along the County line. The deepest hole is in Clay County across the line. It is quite a considerable deeper than in section 30. * * * * There is no material difference between the east half of the south half of section 30 and the other portion of the south half of section 30; one dries up about as quick as the other. (Record p. 27.) Mud Lake has two inlets; one from the north comes from the northwest, and one from the southeast. The largest inlet is the northwest one. They drain maybe five or six sec-

tions; I don't really know how far north it does go. (Record p. 29.) The land is dryer and solider than it was in 1868; cattle can travel over it; the banks are about the same; the sand ridge between the marsh and Lost Island Lake is about two rods wider. I am guessing at that. Schlosser's land is northwest of the beach. (Record p. 30.) I would say that the sand ridge has widened about two rods. In my judgment the ice shoved up to the bank like, shoving up a lot of sand, and the wind has caused it to widen. (Record p. 155 Amendment.) In my best judgment the bar lying between the swamp and Lost Island Lake has been formed by the action of the ice for successive years." (Record p. 30.)

JOSEPH HANSEN testified for plaintiff:

"I have lived in Clay County since 1881. Have observed the lay of the land and water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. (Record p. 30.) Q. Do you know of any inlet coming into Mud Lake from the northeast? Yes, sir. Q. Do you know what extent of country it drains in there? A. It drains into what they call Twelve Mile Lake, I think seven or eight miles to the northeast. I have been there, but I could not tell how large a body of water Twelve Mile Lake is. I could not say that it is the outlet of that lake that runs into the inlet to Mud Lake. I know it did drain from up that way." (Record p. 115.)

J. K. OLIVER testified for plaintiff:

"I have lived in Clay County since the fall of 1871. Two miles from Mud Lake. I got timber there in the winter of 1871 and 1872 from John Anthony. I do not know anything about the lines. but I got it on what is known as the island. There was an impassable channel between his land and the island. * * * * There was a sheet of water over west there. I call it a lake just the same as Elbow Lake and Lost Island Lake." (Record p. 31.)

LEROY GROUT testified for plaintiff:

"Age 60 years. Residence Emmettsburgh, Iowa. Civil Engineer and County Surveyor, Palo Alto County, Iowa, for 26 years. In April, 1893, I made a survey of the south half of section 30, township 97, range 34, and made a plat of the survey. Exhibit "G" is the plat. It is a true and correct plat of the south half of section 30, and shows the high lands and meander lines and section lines and half section lines." (Record p. 12.)

EXHIBIT "G."

Offered in evidence. It appears in the Record at page 12.

"I had the government field notes when I made the survey. It was impossible to trace out the south half of the section and meander of lots 2 and 3 accurately. I approximately found the location of the meander lines from the field notes. The red lines is supposed to show the meander line of lots 2 and 3. I found the southwest corner of the section. There was no meander corner visible. I located a temporary meander corner on the west line of this section. It is right on the shore of the water called Mud Lake. There was more or less water there, as the ice had about gone out. It was slush ice on the surface. There was a bank of earth and rocks the same as are found on the shore of most all our lakes. The white portion of this plat represents land not covered by water or bog. The blue portion represents lake and bog, that is water and bog; the dotted portion represents water and grass. The eastern portion of the half section was wet, boggy land. We could not get across at that time. The portion north of the line marked in red ink indicating the meander line, the white irregular point, is practically covered with timber and brush. At that time this was surrounded on the east, north and west by slush and water.' (Record pp. 12 and 13.)

"This point was mostly surrounded by water and marsh land. * * * * I could hardly state intelligently about the body of water, it was about one-half mile across. I have drawn on the plat a square to indicate where Schlosser's house is located; I can not say that that is the exact location. The land immediately north and west of this point is marshy and boggy and both times I was there it was covered more of less with water. East the land is boggy, and in a wet season is difficult to get over. Lost Island lake is south of this 20 or 30 rods. I made no observation as to whether or not at one time Mud Lake was connected with Lost Island lake *only from the field notes*. A sand bank separates them and has ever since I first saw it." (Record p. 13.)

"There are about 23 acres in this point on the northwest corner of the south half. There are about 19 acres of dry land in the island. I have been in this county 26 years and am quite familiar with the lakes. I first noticed Lost Island lake and lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes." (Record p. 13.)

"I was on the land and made a survey for Hemphill in May a year ago. There was more water then than when I made the first survey." (Record p. 13.)

GEORGE SCHLOSSER testified on his own behalf:

"I first visited the south half of section 30 in 1889, the spring of the year; I was hunting, found plenty of water for ducks right back of the house on the blue land, as represented by plat Exhibit G; out west and north was a clear body of water. There was a body of water there running nearly clear across the section. It covered over half a sebtion . There was no weeds growing up in the water. I went on the water with a boat shooting ducks. The shore line around the timber point is well defined. The water backed up north of the house. I bought the land in 1892, lived on it two years before I bought it. The first year I fenced the timber and some of the south-west corner; built it out in the water some; that was in 1890. Waded out about three feet. In the spring of 1892 it got dry so you could walk across, as shown from A to A. Last year there was water all over the low piece here; the cattle nearly drowned. That portion of the land marked in blue on plat G had water all over it. It came right up to the roots of the trees. There is a spring up near the county line. It took 240 feet of inch piping to hold the water piped out to it to get the water to the shore. There is a vein of water comes out there as big as my arm. Before I put in my tank we had to run the cattle down to Lost Island lake to water them. After I got in a tank we watered 110 head of cattle there. The Beatty boys had two springs up on the north half of section 30. They could water 100 head of cattle during a dry year. The inlet comes in in a northeasterly direction. It draws from what we call Twelve Mile lake; drains the whole country. Twelve Mile lake must be eight miles from Mud lake; has probably two or three hundred acres in it. Mr. Given always talked to me as though he claimed all the land in the south half of the section. Claimed that all that land belonged to my lots 2 and 3." (Record pp. 32-3.)

"I treated it as mine up to the time these squatters commenced squatting on it. * * * * There is a sort of raise right across from A to A. The ridge does not run quite across; there is a raise about half way or two-thirds until you strike a sand bar that runs out in the lake; seems to be a channel that raised up there. The lake extends around to the bar. " (Record p. 33.)

"It runs on the south half in here." (Record p. 116.)

"I moved on the land in 1890; used all the south half of section 30 outside of the water. The water backs over the rest of this that is marked blue on the plat Exhibit G. Whenever there comes a freshet in the spring of the year before the frost is out the water always comes out of the main lake and backs up over the bottom; that was the condition when Exhibit G was drawn. There was more water when Exhibit G was drawn than when the photographs were taken." (Record p. 33.)

SHORE OF LAKE.

LEROY GROUT:

"There was a bank of earth and rocks the same as are found on the shore of most all our lakes. (Record p. 12.) On the east (from the point) it was not as well defined all around if I can remember. On the east shore was low and willows and marsh grass on the shore. Upon the extreme north side it was somewhat higher." (Record p. 13.)

M. S. GREENE took photographs showing shore line:

"The soil between the trees and water as shown by Exhibit 'M" (See Record p. 101.) is stone and gravel, no vegetation; as shown by Exhibit 'N' it is not so stony or gravelly. As shown by Exhibit 'J' it is a dark muck of land. There is a very good bank I think." (Record p. 14.)

This witness also testified that photograph, Exhibit "K" (Record p. 100) correctly shows the shore line.

FRANCIS FITZGERALD:

"Have been on the point of timber frequently. Have examined the shore line on the west side. Raises abruptly from the water. I think slants slightly; gradual slope. Quite a number of trees along the bank six to twelve inches in diameter. They are four or five rods back from the water now. The beach between the water and trees is gravelly close to the bank. Further out it gets muddier. The roots of the trees along the shore line are exposed, I presume by the washing of the water against them. I have seen the water wash up against them. Not in late years." (Record p. 20.)

"Mud Lake has well defined banks along the west and south part in Clay county and in Palo Alto county about a mile. Q. That is true of a greater part of what is known as Mud Lake, it goes gradually into a marsh, instead of having any well defined bank? A. Well, no, there is a good big part of it has a well defined bank, probably two-thirds of it, maybe not that much: I can't tell, I never measured it." (Record pp. 144 bottom, 115 top.)

NICHOLAS RICE:

"The southeast of Mud Lake has well defined banks. The north and northeast portion of the timber point of 23 acres on the west side of the half section is a well defined bank. North of Mr. Schlosser's house is a well defined bank. (Record p. 22.) Exhibit M I should say represents the shore line west of the point Exhibit N represents the same point south taking in a portion of the west shore." (Record p. 23.)

JOHN CROOKSHANK:

"Have set muskrat traps around the point of timber. From the point south-easterly to Schlosser's house was a well defined shore line. There is no well defined shore line where the check marks are, it is marshy, weeds and rushes. Q. South of this body marked lake, lying between tht island and Schlosser's land what is the character of the shore line where it is marked timber? (See Exhibit G, Record p. 12.) Is it abrupt or gently sloping? A. Well, pretty steep, a pretty steep bank along there. At the point marked No. 1, where the arrow is it is sloping gradually. It is a well defined shore line north of the point marked timber south-westerly along the lake, except there is gaps like through the bank and a low place along there. There is willow trees along the shore line. When the water is up it comes right to them. The beach from the water line to the trees is gravelly. There is quite a little timber until you get down to the marsh like and then it gives out." (Record p. 26.)

JOSEPH HANSEN:

"Have observ d the lay of the land and the water in the south half of section 30, township 97, range 34, since 1881. It looked like a clear body of water at that time. In 1884 or 1885, I observed the shore line along the timber point, it was a well defined shore line. The water was pretty well up to the roots of the trees. It has receded from the trees 12 or 14 feet. The beach is gravelly and stony. North-east of the t'm'ber point it is the same. To the north-west the bank are a little more abrupt and higher. As you come down east of the tract it is inclined to be boggy and marshy." (Record pp. 30-31.)

RECESSION OF THE LAKE.

At the time section 30 was surveyed in July, 1857, and sub-divided as to lots 1, 2, and 3, the field notes already referred to show that all the balance of the section was submerged. The whole east side of the section was then under water as shown by the meander lines on section 29 immediately east of section 30. (See Exhibits E and F, Record p. 11.)

J. T. PAINTER testified for the defendant:

"I was in the south part of the state in 1857; came to Iowa in 1855. In 1857 there was a very heavy snow; extremely heavy. That was the spring of the Spirit Lake massacre. The last of the snow did not go off until April. (Record p. 54.)

"I do not know how it was in 1857 *when the survey was made*; except the Island and the point it might have been covered by one continuous body so far as I know; it could not have

been in 1855, because 1855 was an exceedingly dry year. The township range was surveyed in 1855; the sub-divisions in 1857. 1857 was a more wet year and it might have covered a large portion of it." (Record p. 53.)

LEROY GROUT, County Surveyor, testified:

"I have been in this county 26 years, and am quite familiar with the lakes. I first noticed Lost Island lake and the lakes in that vicinity in 1876. I think the water has been receding since that time in all the lakes. (Record p. 13.)

M. S. GREENE, testified;

"Has the water in Lost Island lake receded from where its stage was when you first saw it? A. I should think three feet or so. I think it commenced to fall in 1887. Would recede one year and the next would raise some. I am acquainted with Trumbull Lake and all the lakes in that locality. I know that Trumbull lake has been dry in the last six or seven years. Until that time it looked to me like quite a deep lake. They run a sail boat on Trumbull Lake, I think, in 1874. It has well defined banks." (Record p. 15.)

J. K. OLIVER testified.

"When I came here, after 1872, we kept having a succession of rainy seasons and the water raised in Lost Island lake; that kept up seven or eight years; then the water in Lost Island lake began to recede; that kept up two or three years; then it began to rain heavier than ever. The outlet was impassable for stock until seven or eight years ago; it has been constantly receding from that time up to the last two or three years; this fall they are higher than they was before." (Record p. 31.)

M. L. PARR, testified for defendant;

"All the lakes up north there, Lost Island lake and all the other lakes were higher 20 years ago than in later years; Lost Island was 3 or — feet higher, Mud Lake correspondingly higher." (Record p. 46.)

The field notes of the Barber re-survey, under which plaintiff claims, show, as already referred to, that at the time of the re-survey,

"A rise of 7 inches in the pond would cause water to flow in said outlet, westward, and a rise of two feet would cover the broad grassy flat on each side of it west to Trumbull Lake." (Record p. 81.)

RE-SURVEY.

The records show that May 2nd, 1898, Palo Alto County entered into a contract with Mr. E. B. Evans,

"Authorizing E. B. Evans to represent the County in applying for a survey and selection of swamp land, in sections 29 and 30, township 97, range 34, and providing for a compensation for his services of an undivided one-half interest to all swamp lands patented to Palo Alto County." (Record p. 89.)

Thereafter, under date of June 25, 1898, the Secretary of the Interior approved a re-survey of the land in controversy in section 30. (Record p. 75, Exhibit 26.) Mr. Evans assigned his contract to the defendant, Hemphill, (Record p. 90) and executed to Hemphill, a quit claim deed of the land in controversy as to Hemphilll, being lots 11, 14 and 15 of the south half of section 30. This deed was dated August 23rd, 1898. (Record 90, Ex. 40). These three lots were under the re-survey, certified and patented by the Land Department of the State of Iowa as swamp lands. The State of Iowa issued a patent for them to Palo Alto county. Palo Alto County made a contract of sale for them with the defendant, Hemphill. (Record 86, Exhibit 35.) Hemphill thus acquired whatever title Evans and Palo Alto County might have under the re-survey and the swamp land patents for these three lots.

The south boundary line of the lots thus claimed by defendants, Ryan and Hemphill, purports—according to the plat of the re-survey (Record p. 73, Exhibit 2)—to be the meander line of plaintiff's lots 2 and 3 and cover the entire north front of that meander line. According to the field notes of the re-survey, as testified to by Mr. Grout, "Civil Engineer and County Surveyor of Palo Alto County, Iowa, for twenty-six years." (Record 12.) and he is not contradicted; the re-survey "runs in the timber back of Schlosser's house about fifty feet from the bottom of the bank along slough or lake; it runs about thirty rods on the slope of the bank taking in a part of Schlosser's timber. As near as I could determine when I tried to run the original meander line it would run through the slough quite a ways north of that. My computation of the number of acres left to Mr. Schlosser by Barber's survey (re-survey) would be 98.50. (Record p. 92.) The patent under which Schlosser claims calls for ninety-nine acres and eighty hundredths of an acre." (Record p. 120)

The decision of the Supreme Court of Iowa confined Schlosses to the meander line of his lots, and refused him all relief as stated supra, and he sued out from this court the writ of error herein to review that decision.

ASSIGNMENT OF ERRORS.

Plaintiff in error says there is a manifest error upon the face of the record in the decision and judgment of the Supreme Court of Iowa, in the following particulars:

1. Under the laws, statutes and decisions of the United States the meander line is not the boundary line of lots sold by the United States, but is run for the purpose of conforming to the irregularities and sinuosities of creeks and lakes for the purpose of ascertaining the amount of land for which the Government charged upon the sale thereof.

2. The Court erred in holding and deciding in its said opinion and decision that plaintiff in error was not the owner of the real estate involved in said controversy.

3. The Court erred in construing the laws of the United States not to convey title under the patents issued to plaintiff's grantor to lots two and three of section 30, township No. 97, range No. 34, west 5th P. M. Iowa.

4. The Court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to meander lines.

5. The Court erred in refusing to follow the decisions of the Supreme Court of the United States in construing the statutes of the United States as applied to lands included in patents issued by the Un ted States.

6. The Court erred in holding that a new survey of the lands in controversy could affect plaintiff's title acquired by patent from the United States, dated October 10th, 1874.

7. The Court erred in holding that there was any authority of law under the statutes and Act of Congress authorizing a re-survey or further survey of land under the facts disclosed in this case.

8. Under the statutes and various acts of Congress in relation to surveys and sales of the public domain, the original survey as disclosed in this case, and the sale by the Land Department of the United States, and the patents issued by the United State in pursuance of such sale, conveyed title to plaintiff's grantor, and plaintiff, by mesne conveyance from such grantor, took title to the land in controversy, and in said judgment and decision, the Supreme Court of Iowa erred in refusing to establish and quiet the title of plaintiff in error thereunder. (See Record p. 131.)

9. The Court erred in holding that at the time of the government survey there was no lake "proper" or "necessary" to be meandered, and erred under the pleadings in assuming to decide such issue, thus depriving plaintiff in error of his right and title to the land in controversy as specially claimed and set up by him.

10. The Court erred in holding that the meander line of the lots of plaintiff in error was not correctly run, and erred under the pleadings in attempting to decide such issue, thus depriving plaintiff in error of his title to the land in controversy, or any part thereof, as the same was specially set up and pleaded by him.

11. The Court erred in deciding that the land in controversy was not surveyed until the year 1898.

12. The Court erred in holding that the swamp land title could be asserted against the right and title of plaintiff in error after a delay of nearly forty-eight years on the part of the State of Iowa and Couuty of Palo Alto in asserting the title or claim to any portions of the land in controversy under the swamp land grant.

13. The Court erred in holding that the right or title of plaintiff in error to the land in controversy could be in any manner affected by the resurvey ordered and made in the year 1898.

14. The Court erred in holding that the claim of defendant Hemphill under the Swamp Land Grant was not barred by lapse of time and by the possession of plaintiff in error, and those under whom he claims title.

15. The Court erred in holding that defendant Ryan was entitled under the survey of 1898 to enter and hold lots 12 and 13 under the homestead laws of the United States.

16. The Court erred in holding that the title and right of defendant Ryan to lots 12 and 13 of the survey of 1898 was superior to that of plaintiff in error.

17. The Court erred in holding that the right and title of defendant Hemphill to lots 11, 14 and 15 of the survey of 1898 was superior to that of plaintiff in error.

18. The Court erred in denying the title of plaintiff in error to lots 11, 12, 13, 14 and 15 under the survey of 1898, and in denying his right and title to each of said lots under the government patent to Anthony, his remote grantor.

POINTS OF LAW AND FACTS..

I.

THE CONTROVERSY.

Plaintiff in error claims title to the south half of section 30, township 97, range 34, under patent which conveyed to his remote grantor Lots 2 and 3 of that section "containing ninety-nine acres and eighty-hundredths of an acre, according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General." (Record p. 120.) The two lots extend nearly across the south end of section 30; the balance of the section except the small lot in the north-west corner was meandered out and not fully sub-divided by the original survey of 1855 and 1857. (Exhibits E and F, Record p. 11.)

The official survey shows that a lake lay north of the meander line of plaintiff's lots. (See field notes, Record 56-7, 113, 120.) North of the meander line, and between it and the actual shore

of the lake were about one hundred acres of land. (See opinion ofcourt below, Record p. 126.)

Plaintiff in error claims:

1. That the patent under which he claims gives him the dry land between the meander line and the lake. (See his petition, Record pp. 1 and 2.) This claim was rejected by the court below upon the ground that there was no lake "proper to be meandered." (Record p. 127) and upon the ground "that the meandered l ne was not correctly run in the first instance." (Record p. 128.) The pleadings show that no such questions or issues were presented or raised for determination. (Record pp. 1 to 10.)

2. Plaintiff also claims that the patent of his remote grantor gives him title to the entire south half of section 30. (Record p. 1.) This claim depends upon whether or not the patent under which he claims conveyed title to the center of the meandered lake.

The court below denied his claim of tit e in this behalf and confined him to the meander line of his lots. It did not expressly pass upon the question of title to the bed of the lake, but denied relief to plaintiff in error upon the above stated grounds that the lake was not "proper or necessary to be meandered," and that the meander line was not correctly run. (See opinion, Record pp. 126 to 128.)

Defendant Ryan claims under the homestead laws of the United States and under the re-survey of the part of section 30 meandered out by the original survey of 1857. (See his answer, Record pp. 2, 3 and 4, Amendment to answer, Record p. 8.)

Defendant Hemphill claims title to a portion of the land in controversy under the same re-survev and patents to the State of Iowa and Palo Alto county under the Swamp Land Grant. (See his answer, Record p. 6, and Amendment thereto, Record pp. 9-10.)

Plaintiff in error by reply and in avoidance of these claims of defendants sets up that the re-survey was unauthorized and void, and did not affect his title; also adverse possession and the bar of the statute of limitations. (See replies, Record pp. 7, 8, 9, 10, 111 and 112.)

II.

BEDS OF NON-NAVIGABLE LAKES IN IOWA.

The Supreme Court of Iowa, as to riparian owners, under government patents, never has decided the question of the title to beds of non-navigable lakes. The following are its only decisions which have any bearing on that question. They do not decide it.

Noyes vs. Collins, 92 Iowa, 567-8-9.
Noyes vs. Supervisors, 104 Iowa, 175.
Rood vs. Wallace, 109 Iowa, 8-11-13-14.
Grant vs. Hemphill, 92 Iowa, 218.
Schlosser vs. Cruickshank, 96 Iowa, 37.
Ladd vs. Osborne, 79 Iowa, 93.
Ogden vs. Buckley, 116 Iowa, 357.

This Court will not be guided on this question by *dicta* of the Supreme Court of Iowa, nor by what it may have said *arguendo.*

Hardin vs. Jordan, 140 U. S., 385 and 387.

III.

AS TO MUD LAKE.

In the case at bar the Court below having grounded its decision upon the supposititious issues that the lake "was not proper" or "necessary" to be meandered, and that "the meander line was not correctly run in the first instance" did not decide that Mud Lake was not a permanent body of water. On the contrary, the opinion recognized it as permanent. (Record pp. 126-127-128.) The Record shows that the lake is permanent. (See letters of ~~Commissioner~~ Secretary of the Interior, (Record pp. 75 and 76.) And see field notes of re-survey, (Record p. 81.) Also testimony of defendant, (Record p. 85;) of Greene, (Record p. 16.)

Plat of Barber's re-survey, Exhibit 2, Record 73.
Testimony of Painter for defendant, Record p. 42, and his plat, Exhibit 21, Record p. 44.

See also testimony of witnesses, *supra,* in statement of case and especially under titles "Banks of Lakes" and "Recessions of Lakes."

The year 1857, when the government survey was made, was a wet year. (Testimony of Painter for defendant, Record 534.) The field notes of the re-survey of 1898 show that "a rise of seven inches in the pond (Mud Lake on section 30) would cause water to flow in said outlet westward, and a rise of two feet would cover the broad, grassy flat each side of it west to Trumbull Lake." (Record p. 81.)

The plat of the survey of 1857 (Exhibits E and F, Record 11) are conclusive as to the meander lines.

U. S. vs. Vallejo, 1 Wall, 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52 and 54.
Smelting Co. vs. Kemp, 104 U. S., 641.
Russell vs. Maxwell & Co. 158 U. S. 253.

"If there was a lake abutting on the north of the lots, plaintiff in error would take the land between the meander line and the water, and all accretions."

Live Stock Co. vs. Springer, 185 U. S. 54.

The plat and survey are to be taken as a part of the patent.

Hardin vs. Jordan, 104 U. S., 371.
Niles vs. C. P. Club, 175 U. S., 306.
Chenowith vs. Haskell, 3 Pet., 96.
White vs. Burnley, 20 How., 248.
Brown vs. Clements, 3 How., 671.
Hardin vs. Shedd 190 U. S., 520.
Cragin vs. Powell, 128 U. S., 691.
Jeffries vs. East Omaha Co., 134 U. S., 194.

The land under water was covered by and embraced in the survey of 1857.

Kean vs. Calumet Co., 190 U. S., 460.
Hardin vs. Jordan, 140 U. S., 371.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Roby, 145 Ind., 221.

The meander line is not a boundary and does not limit the title of a riparian owner. He takes to high water mark of navigable water, and at least that far on non-navigable water.

Schlosser vs. Cruickshank, 96 Iowa, 549.
Kraut vs. Crawford, 18 Iowa, 549.
Musser vs. Hershey, 42 Ia., 356.
Steel vs. Sanchez, 72 Ia., 68.
Ladd vs. Osborne, 79 Ia., 95.
Grant vs. Hemphill, 92 Ia., 218.
Case at bar, Record 126.
Hardin vs. Jordan, 140 U. S., 380.
Horne vs. Smith, 159 U. S., 45.
Railroad Co. vs. Schurmeir, 7 Wall., ~~43~~ 213.

IV.

THERE IS NO ISSUE AS TO WHETHER THE LAKE WAS "PROPER" OR "NECESSARY" TO BE MEANDERED, NOR WHETHER THE MEANDERED LINE WAS CORRECTLY RUN.

The issues tendered by the answers were:

"As to whether said lots were meandered, defendant has not sufficient knowledge to form a belief, and denies the same. The defendant denies that such meander lines were run with

reference to a lake then existing in part upon section 30." (Record pp. 2 and 6.)

Whether the lake was "proper or necessary to be meandered," and whether the "meander line was not correctly run," was clearly matter in avoidance. It can not be proven unless pleaded.

Under the general denial authorized by the Code of Iowa no affirmative defense can be proved.

Scott vs. Morse, 54 Iowa, 734.
Morning vs. Long, 109 Iowa, 290.

Code of Iowa, 1897, Sec. 3615, reads:

"Under a denial of an allegation no evidence shall be introduced which does not tend to negative some fact the party making the controverted allegation is bound to prove."

This, under the Code, applies to both equity and law, and leaves the rule of pleading under the ancient equity practice in full force.

Under the ancient practice the rule of *allegata et probata* is too familiar to require a citation of authorities. Proof without pleading is no better than pleading without proof.

That matter in avoidance must be pleaded and proven by the defendant, see—

Bush vs. Marshall, 6 How., 289.
Clarke vs. White, 12 Pet., 190.
Clements vs. Moore, 6 Wall., 315.

Chancellor Kent shows that this is a rule both in equity and at law.

Hart vs. Ten Eyck, 2 Johns. Ch. Rep., 90-95.

To the same effect, Lord Eldon in,

Thompson vs. Lambe, 7 Ves., 587.
Greene vs. Hart, 1 Johns. Rep., 580.

But if the defendants saw fit to go further, as they had the right to do, and aver additional matter on which they relied in defense, they must prove the additional matter, it being traversed by the general replication.

New England Bank vs. Lewis, 8 Pickering, 119-120.

This Court has distinctly held that failure to aver matter proper in avoidance deprives a defendant of that defense.

Seitz vs. Witchell, 94 U. S., 585.

Proofs without allegations, and allegations without proofs, are alike to be disregarded?

Hunt vs. Daniel, 6 J. J. Marsh, 398.

Proofs to be admissible must be founded upon some allegations in the bill and answer.

Piatt vs. Vattier, 9 Pet., 415.

This case is followed in,

Scott vs. Evans, 1 McLean, 489.
Same case, Federal Cases, 12,529.
Day vs. Hartshorn, 7 Fed. Cases, 240.
Maulding vs. Scott, 13 Ark., 95.
Hackney vs. Butts, 41 Ark., 400.
Keeton vs. Keeton, 20 Mo., 542.
Gross vs. Disney, 95 Tenn., 595.
Same case, 32 S. W. Rep., 633.
Dorr vs. Rohr, 82 Va., 366.

And as to necessity of setting up avoidance in pleadings,

Long vs. O'Fallon, 19 How., 125.

And see.

3 Greenl. on Ev., 15 Ed., Secs. 355-356.

V.

TITLE AS TO BED OF THE LAKE.

The title as to the bed of the lake is a common law question, and at common law the riparian owner takes to center of the lake unless the State courts have established a different rule.

Hardin vs. Jordan, 140 U. S., 371.
Kean vs. Calumet Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

The Supreme Court of Iowa has not decided this question one way or the other. See its decisions cited *supra*, division V. This Court must decide for itself and must assume that the common law of Iowa as to the beds of non-navigable lakes, is as decided in Hardin vs. Jordan, *supra*, and the cases following it.

This carries the title of plaintiff in error to the center of Mud Lake, or to such portion of Mud Lake less than that as he claims in his petition. What he claims is the south half of section 30. (See petition, Record p. 12.) This carries him just to the center of the lake on the west line of the section, and to less than the center as the half section line is extended from west to east.

See plats of Government survey, Exhibits E and F (Record p. 11.)

Also plat of Barber's re-survey in 1898, Exhibit 2. (Record 73.)

And plat of defendant's witnesses, and surveyor Painter, (Record Exhibit 44), and see facts stated, *supra*, Division "AS TO MUD LAKE," including field notes of survey, and of Barber's re-survey.

For field notes of original survey see Record pp. 121, 113, 56 and 57. For field notes of resurvey see Record pp. 31 and 32.

As to the small island containing nineteen acres (See plat Exhibit G, Record 12; and testimony of witness Grout, Record 13) the plaintiff takes title to this or such portion as lies in the south half or section 30.

St. Louis vs. Rutz, 138 U. S., 245 to 251
Sanford vs. Mangin, 30 Ga., 355.
Kimball vs. Schoff, 40 N. H., 190.
Hardin v Jordan 140 U.S. 384

VI.

THE RE-SURVEY.

The Court below, as shown by its statement of the case, treated the claims of both Ryan and Hemphill as arising under the Swamp Land Grant (Record p. 126), and decided the case under the Swamp Land Grant only. Ryan claimed under a homestead entry made under the re-survey, one hundred and one acres of land between the meander line of Schlosser's lots and the lake. (Record 5, Exhibit E; plat of re-survey 73, Exhibit 2.)

This is the very quantity of land lying north of the meandered lots, and between those and the lake which the Supreme Court of Iowa gave to Schlosser in the prior case of Schlosser vs. Cruickshank, 96 Iowa, 414.

As to this land, it was covered by the riparian rights under the Anthony patent, and no subsequent survey could affect it.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.
Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 193 U. S., 453.
Grand Rapids &c. Co. vs. Butler, 155 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.

The case of Mitchell vs. Smale, *supra*, is in point, and is very pursuasive on the facts in the case at bar.

Cases where, under special facts, the meander line is held

to be a line of boundary are distinguishable from the above authorities and from the case at bar. These are

French-Glenn &c. Co. vs. Springer, 185 U. S., 49.
Security Land &c. Co. vs. Burns, 193 U. S., 167.
Niles vs. C. P. Club, 175 U. S., 300.
Hahn vs. Smith, 159 U. S., 41.

VII.

THE SWAMP LAND GRANT.

Under the Government survey and plat the lots shown to be swamp, by the re-survey, were *prima facie* part of Mud Lake, and title passed under the Anthony patent either to the center of the lake or as accretions to the meandered lot if it should be held that Anthony's patent took only to the edge of the lake.

This being so, the Land Department in approving the survey and plats and issuing Anthony's patent thereunder necessarily adjudicated that these lands were not swamp lands.

Erdhardt vs. Hogaboom, 115 U. S., 67-69.
Frazier vs. O'Connell, 115 U. S., 102.
McCormick vs. Hayes, 159 U. S., 347.
Rogers Locomotive Works vs. Emigrant Co., 164 U. S., 573.

The State of Iowa and County of Palo Alto were barred by possession of grantees under the Anthony patent, and by lapse of time and *laches* from selecting the lands in controversy as swamp under the Act of 1850. Their grantee, Hemphill, is equally barred.

McCormick vs. Hayes, 159 U. S., 347.
Rogers Locomotive Co. vs. Emigrant Co., 164 U. S., 573.

Congress, by Act approved March 12th, 1860, provided,

"That the selections to be made from the lands already surveyed in each of the States, including Minnesota and Oregon, under the authority of the Act aforesaid (Swamp Land Grant), and of the Act to aid the State of Louisiana in draining the swamp lands therein, approved March 2, 1894, shall be made within two years of the adjournment of the legislature of each State at its next session after this Act, and as to all lands hereafter to be surveyed, within two years from the adjournment of the next session after notice by the Secretary to the Governor of the State that the surveys have been completed and confirmed."

The next regular session of the Legislature of Iowa after the passage of this Act adjourned April 9th, 1862. The Act required swamp lands in Iowa to be selected and reported by April 9th, 1864. Section 30 was fully surveyed in 1857. The corners of the northwest, southwest, and southeast of that section were all marked by posts set up by the Government surveyor. The northeast corner was marked by a witness corner and post then set. (See field notes, Record pp. 121, 113, and 56.) The quarter section post for the east line of section 30 was set in like manner. (Record p. 56.) This sufficiently indicated where the boundary line between the north half and the south half of section 30 would run. No quarter section post was set on the west line because of the lake.

Palo Alto County and the State of Iowa might, therefore, have selected the swamp lands in section 30 within the date fixed by the above Act of Congress. No action was taken in this respect until 1898. Meanwhile the rights of Anthony and those claiming under his patent had accrued. The plaintiff had purchased lots 2 and 3 relying upon securing thereby the whole south half of section 30. His grantor made the same claim. (Schlosser's testimony, Record p. 33.) And Schlosser occupied the land under this claim, from his purchase in 1892 up to the time of the re-survey and swamp selection. (Ib. Record pp. 32, 33, 34.)

Under these circumstances the swamp land claim of Palo Alto County and its grantee, Hemphill, is clearly barred even if we concede the land to have been swamp in fact.

That adverse possession may avail as against *laches*, see,

Piatt vs. Vattier, 9 Peters, 416.

VIII.

JURISDICTION.

The questions involved are purely as to the legal effect of the Anthony patent under which plaintiff in error claims,

1. As to its effect in giving title to the center of the lake or to the shore of the lake including accretions,

2. As to its effect in giving title superior to that under the Swamp Land Grant.

The Court below did not decide the case on any finding of facts which limited the legal effect of the Anthony patent. The holding that Mud Lake was not "proper" or "necessary to be meandered" was a conclusion of law from the Government survey and from the testimony of witnesses.

The same is true of the holding that the meander line was not correctly run, and that was a conclusion which the

court below was without jurisdiction to decide, for the meander line was conclusive.

Furthermore, as has been pointed out, there was no issue as to these matters in the pleadings.

The decision of the court below in favor of the swamp land title involved no finding of facts limiting the effect of the Anthony patent. That decision was also based wholly upon the rulings that Mud Lake was not "proper" or "necessary to be meandered," and that "the meander line was not correctly run."

The question of jurisdiction has been decided by this Court in two cases precisely like the case at bar.

Kean vs. Calument Canal Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

In the former of these cases it was pointed out by Mr. Justice White in his dissenting opinion that the question of jurisdiction was involved.

190 U. S., 474-5.

In the Hardin-Shedd case the question of jurisdiction was fully argued both for the plaintiff in error and for the defendant in error, as shown by their briefs with the reported case. (190 U. S., pp. 516-517.)

This Court maintained its jurisdiction in both cases, citing in the Hardin-Shedd case, evidently as to that point,

Mitchell vs. Smale, 140 U. S., 410.
Shively vs. Bowlby, 152 U. S., 10.

The question of jurisdiction must be decided by this Court whether insisted upon or not.

Continental Bank vs. Beauford, 191 U. S., 119.
Defiance Water Co. vs. Defiance, 191 U. S., 184.

In the following cases it was expressly decided that this Court had jurisdiction, and they are in point in the case at bar.

Shively vs. Bowlby, 152 U. S., 9 and 10.
French-Glenn Co. vs. Springer, 185 U. S., 54.

ARGUMENT.

I

The controversy in this case is as to the effect of the patent from the United States under which plaintiff in error, Schlosser, who was plaintiff below, claims title. That patent was issued under homestead law; it was dated October 10, 1874; it covered

lots 2 and 3 of section 30, in township 97, of range 34," containing ninety-nine acres and eighty hundredths of an acre according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General." (Record p. 120.)

The official plat shows that the two lots extend nearly across the south end of section 30. The balance of the section, except a small tract in the north-west corner, was meandered out and was not sub-divided. (Exhibits E and F, Record 11.)

The testimony shows that Lost Island lake—admitted to be a deep and permanent lake—lies on section 31 immediately south of the land in controversy, and the meander lines laid down on the official plat above referred to show an outlet between Mud Lake on Section 30 and Lost Island lake on section 31. The outlet thus depicted is about 40 rods in width. There is evidence showing that there is now a sand bar between the two lakes, pushed up by the action of the ice and the wash of the water. (John Cruickshank, Record 30 and 115.)

The evidence shows without controversy that north of the meander line of plaintiff's lots, and near the north west corner, there is a high point of land—containing twenty-three acres—pushed out into the lake like a thumb. This, it is conceded, has always been dry land. It is a portion of defendant Ryan s homestead entry. The surveyor, in 1857, instead of tracing the sinuosities of this point ran his meander line across the base of it, leaving it outside and north of such meander line.

One question in controversy is whether plaintiff under his patent, and by virtue of it, takes this point of twenty-three acres between the meander line and the lake as well as other dry land between the meander line and the lake.

Plaintiff's claim is two-fold; he claims:

1. That his remote grantor's patent gives him the dry land between the meander line and the lake. This claim was rejected by the Supreme Court upon the ground that there was no lake "*proper* to be meandered." (Record p. 127.)

2. Plaintiff also claims that his remote grantor's patent "includes all of the land embodied in the south half of said section and his title is complete as to all of said land claimed adversely by the defendants."

This claim was also rejected by the Supreme Court of Iowa. It depends upon whether the patent under which he claims conveys title to the center of the meandered lake north of his land.

II.

BEDS OF NON-NAVIGABLE LAKES IN IOWA.

The Supreme Court of Iowa never has decided in whom as to riparian owners under government patents, the title to

the beds of non-navigable lakes in Iowa is vested. Its decisions so far as they bear upon this question are as follows:

In a case decided in 1894 it appeared that

"*Section 15 is a part of the swamp land grant from the United States to the State of Iowa, and from the State to Harrison County.* The lot was conveyed by the County to one Morgaridge and after mesne conveyances the title vested in the plaintiff. What was known as 'Dry Lake' was in part *on section* 15, and was a body of water from five to seven miles in length, and from eighty to one hundred rods in width. Its depth was from three to seven feet. The boundaries of lot number 6 in the deeds of conveyance are as follows: 'Commencing at the south-east corner of section 15, township 80, range 45, and running to Dry Lake, thence south west, by the meanders of said Dry Lake, to the south line of section 15; thence east along said line to the place of beginning,—containing thirteen acres,—more or less."

The question was whether plaintiff, under these circumstances, and under such conveyance, took to the middle of Dry Lake. The Court said:

"It may be conceded as the rule that riparian owners of lands bordering on rivers or steams not navigable, in the absence of a limitation in the title, take to the center thread of the river or stream. A case of such limitation of title is found in Murphy vs. Copeland, 58 Iowa, 409, 10 N. W. Rep., 786. In this State no such rule has been applied to lakes or ponds. 'Dry Lake' —as it was called— was meandered by the Government Surveyors, and nothing in the record indicates that in any of the conveyances of lot number 6 there was any purpose to include a part of the bed of the lake. No such claim is made, urther than the acts of the parties would be affected by the rule of law as to such riparian owners. In Dietrich vs. Railway Co., 42 Wis., 248, it is said: 'The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally—almost universally—recognized.' Our views are generally in accord with the doctrine thus announced. It is not only in harmony with the general adjudications on the subject, but it seems, it view *of the particular fact of this case*, equitable."

Noyes vs. Collins, 92 Iowa, 567-8-9.

It will be seen that in this case the county took the whole of section 15 under the swamp land grant. The boundaries of the deed of conveyance under which plaintiff claimed were such that he might well be confined to the meander line along the lake, the title to the lake itself remaining in the County under the swamp land grant. There is no intimation that the title to the bed of the lake was in the State of Iowa. The case seems to have been decided "in view of the particular facts,"

quite as much as with reference to any rule as to riparian ownership along "a natural lake or pond."

Following this case was one decided in 1897 also involving a claim of title to the same lake as in the case *supra*.

The Court said.

"In the Noyes-Collins case the title to a portion of the bed of this same D.y Lake was in controversy; and it was held, *under the facts*, that the land lying in the lake bed was not an accretion to the land of plaintiff in that case, and that the rule that a riparian owner of land bordering on rivers or streams, in the absence of limitation in his title, takes to the center thread of the streams, does not apply in this state to the case of a lake or pond."

Noyes vs. Board of Supervisors, 104 Ia., 175.)

In this case the Court also said:

"All parties claim through the swamp land grant of 1850. It is admitted that these lakes were never navigable; and it appears without conflict that the defendant county has from time to time, for many years, surveyed portions of these lake beds, has platted the same in lots, and sold said lots to various parties. It is conceded that these lakes were meandered by the general government surveyors in 1851 and 1852, and that they never became wholly dry and their entire beds fit for cu tivation, until along about 1890 or 1891. The county having ordered the remaining unsurveyed portions of these lakes to be surveyed into lots, and caused the same to be appraised and offered for sale, plaintiffs applied for and obtained a temporary injunction restraining the sale of the lots. On final hearing, the injunction was dissolved, and from that decree the plaintiffs appeal."

Ib. pp. 174-5.

It having been decided on the facts in the Noyes-Collins case, that the county held the bed of the lake under the swamp land grant, the only real question was whether it had parted with its title thereto to its grantees. Under the special facts it was held that it had not.

It is obvious that the facts in this case are so peculiar that the decision depends thereon, and not upon any general principle of law. The court is far from intimating that the title to the bed of such lakes vests in the State for any purpose. The statement that a riparian owner does not take title to the center of the lake or pond is dictum so far as settling any general rule of law is concerned.

In 1899 there came before the court a case involving lands originally submerged by Owl Lake. This lake had been partially drained so that the lands in controversy had become fit for cultivation. Plaintiffs claimed the land under the swamp

land grant. Defendants claimed under the homestead and pre-emption laws. The right of riparian owners along the lake were in no manner involved. The State of Iowa intervened and claimed the land upon the ground that the title to the bed of the lake was vested in it.

The State, however, had requested patents for the lands in controversy as swamp land, which request had been complied with and patents issued. Thereupon the State had issued patents to Humboldt County, where the lake was located, and Humboldt County had sold the lands, the plaintiff claiming under its conveyances. Very naturally it was held under these circumstances that the State could assert no interest in the lands.

The Court said in passing upon this question: (page 28.)

"We are quite ready *to assume*, as a general proposit on, that title to all the lake beds in the state, especially *those of navigable lakes*, is in the state; and that the general government never had any control or ownership thereof. * * * * But, when, how, and by whom is the question of whether the land is a *lake bed* to be determined."

Answering that question the Court says:

"There seems to be no doubt that the Secretary of the Interior had the right, *in so far as the parties to this suit are concerned*, to re-determine the question as to whether or not the land in question was a part of the lake bed, or was covered by the so-called 'Swamp Land Act.' This brings us to the next question: What force is to be given the determination of the land commissioner that the land was in fact swamp land, and what effect is to be given the patent issued to the state?"

And as to the effect of a patent under the swamp land grant issued after the Secretary of the Interior has investigated that question, the Court says:

"Whenever question arose as to the character of the land in dispute, it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter; and, having so submitted it, that decision is final. If there was no real dispute as to the character of the land,—if, for instance, the property was a part of the bed of any of the *navigable rivers* of this state, or if it was property which *was clearly lake bottom,—it may be* that the governor would not be justified in submitting the matter as to its character to the land department; and if he did so, and the land department found that the land was swampy when surveyed, such conclusion would be null and of no effect. But when there is a fair dispute as to the character of the land when originally surveyed, surely the land department has the right to determine the dispute; and, as a general rule, its decision is binding until set aside by direct attack. The whole case, in our judgment, turns upon the effect to be given the original survey. If that

is conclusive, it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms the title thereto in the state. If the survey is not conclusive, but is simply administrative or advisory, then the land department has the right at some future day to determine its character, and cause a patent to issue accordingly. And when this is done the finding is not subject to collateral attack."

Rood vs. Wallace, 109 Ia., 8-11-13-14.

This case in no manner determines or affects the rights of riparian owners. The court was careful to say:

"Purchasers of lots abutting on meander lines or otherwise directly interested, are, it seems to us, the only persons who may object to the resurvey; *and no resurvey will be permitted* which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title."

Ib., pp. 9 bottom and 10 top.

What the court did decide was

"That the Secretary of the Interior had the right, *in so far as all parties to this suit are concerned*, to re-determine the question as to whether the land in question was a part of the lake bed or was covered by the so-called Swamp Land Act."

It then held

"As the Land Department determined the lands in controversy to be swampy, and issued its patent to the State accordingly, that determination is conclusive, and the patent can not be collaterally attacked. * * * * If the State has no title its petition of intervention should be dismissed without regard to the title under which plaintiff claims."

Ib. p. 12.

And it further held,

"That the Governor of the State had authority to apply for patents to the land to the State under the Swamp Land Grant, and that the State having parted with its interest by its patent to Humboldt County of the land as swamp land, that it could not maintain its petition of intervention for want of title or interest. As to the parties defendant claiming that the lands were subject to entry under the homestead and preemption laws the decree was against them obviously upon the ground that the lands were swamp and passed under the swamp grant."

From this analysis of the case it is obvious that the Court was speaking purely *arguendo* when it said,

"We are quite *ready to assume* as a general proposition that title to all the lake beds in the State, *especially those of*

navigable lakes, is in the State, and that the general government never had any control or ownership thereof."

There was no such question for decision in the case because the holding was that the lands were not a portion of the bed of the lake at all, and were, under the finding of the Land Department, on the resurvey, conclusively found to be swamp land, and it followed that "the finding was not subject to collateral attack."

The State of Iowa attempted to review this decision on writ of error from this Court, but it was here held that the title which it set up did not arise under the Constitution or an act of Congress, and that no federal question was involved. The writ of error was therefore dismissed on motion. This Court said as to the contention of the State that the "Government surveyors in segregating and setting apart the land in question by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office" adjudicated that the lake so segregated was the property of the State of Iowa.

"We do not interpret the action of these officers. They undoubtedly did survey the lands adjoining this lake, and meander the lake itself, but they determined nothing as to the title of the land beneath its waters—a determination which would have been wholly beyond their powers."

Iowa vs. Rood, 187 U. S., 93.

The next case (Carr vs. Moore, 119 Iowa 152) involving a lake was decided by the Supreme Court of Iowa in 1903. The body of water, says the Court, was

"What was at one time known as 'Iowa Lake,' claimed to have been a body of water situated in Hamilton County, and in extent about a mile and a half each way, of very irregular outline, with a shore line of over six miles and an area of eight hundred and eighty-five acres. When the government survey of the surrounding land was made in 1849, the so-called lake was meandered, and the two plaintiffs own lots platted by the surveyor as bordering on this meander lake. The bed of the lake is now practically dry land, and plaintiffs claim portions of the bed as having been added to their adjoining lots *by accretion or reliction*, and ask that either the whole bed of the lake be decreed as owned in common by the adjoining proprietors in proportion to the extent of their assumed shore line, or that by lines running from the intersections of their boundaries with such assumed shore line to some point which may be found to be the center of the lake, portions of the lake bed may be set off to them in severalty." (pp. 153–4.)

The defendants claimed title under the swamp land grant and a purchase from Hamilton County. As to this claim the Court said:

"It is enough to say that he (the defendant) does not show any selection of the land by the proper department of the federal government, or recognition by it of the land as passing under the swamp land act. No doubt, the swamp land grant was a grant *in præsenti*, but the passing of the title under the grant depends on a question of fact, which can not be adjudicated by the State and its grantees for themselves. The determination as to whether the land is swamp land must be, in the first instance, by the proper department of the federal government; and, until some determination has been made, the grantee claiming under the swamp land grant has only at best an inchoate right, not amounting to a title. This has been settled in a case recently decided in this Court. See Ogden vs. Buckley, 116 Ia. 352. Under the rule announced in that case, we can not grant to defendant any affirmative relief." (p. 159.)

The Court states in its opinion that

"About ten years after the survey, although previous to that time it had contained water, the so-called lake became practically dry during one season. * * * * It was swampy in character,—the bottom composed of prairie mud and a peaty substance. * * * * It had no springs or other subterranean sources of water supply, nor did it have any definite inlet, * * * *. About fourteen years before the bringing of these suits it became practically dry. At the present time, owing to the cultivation of the surrounding country, the surface water does not drain into it. Some of the witnesses liken it to ordinary sloughs or ponds, save as to its greater extent." (pp. 154–5.)

It will be seen that the question in this case, as stated by the Court, was *whether the plaintiff acquired title to a portion of the bed of the lake "by accretion or reliction."* There was no claim on his part that he took title to the center of the lake, or any portion of the lake, by virtue of the original patent from the Government under which he claimed, together with the survey, plat and field notes with refercnee to which the patent was issued. The Court said as to the claim of accretion or reliction,

"To furnish occasion for the application of the rules of law on these subjects, there must have been in this case a lake, and the addition to plaintiffs' lands must have been gradual and imperceptible." (pp. 155–6.)

"It is enough to say in the present case that there is no evidence of accretion or reliction. It does not appear that the drying up of the water of the lake resulted in gradual and imperceptible increment to the lands of plaintiffs. It is perfectly clear that the water did not slowly recede to a different shoreline surrounding a remoter body of water, which further subsequently disappeared, extending the titles of the surrounding

owners to the center, for the testimony all shows that the lake was shallower in the center than in some of its portions near the original margin line. In short, there is a total want of such evidence as has been held sufficient in the cases on the subject to show imperceptible additions, enlarging the areas of land owned by riparian proprietors. (Citing authorities.)

"The question we are now considering is practically controlled by the conclusion of the Court in Noyes vs. Collins, 92 Iowa 566, which was analogous, save in that the lake was rendered dry within a year by drainage; but the recession of the water from the land was no more sudden during the year during which the lake there considered was drained than it wa in this case when the lake became dry for the last time. The insuperable difficulty with plaintiff's claims, under the doctrine of accretion or reliction, is that there is no evidence to support them. See Hodges vs. Williams, 95 N. C. 331 (59 Am. Rep. 242.)

"From what has already been said, it is apparent that there was at the time of the original survey no lake, in the proper sense of the term, such as to give occasion for the application of the doctrines of accretion and reliction." (pp. 156–7.)

This decided the whole case before the Court. The trial court had refused relief to either party, and had dismissed the petition and cross petition of each. Its decision was affirmed.

But the Court considered other questions. As to its ruling above quoted, that there was "no lake in the proper sense of the term," it said:

"But it is contended for plaintiffs that the character of the body of water was determined by the surveyor in meandering it, and that the approval of his survey by the United States Land Department constituted an adjudication which can not now be questioned." (p. 158.)

And as to this contention, the Court said:

"We have held that if, by evident mistake on the part of the surveyor, a meander line is run where there is no body of water *proper* to be meandered, the title of the owners of lots or fractional subdivisions on the meander line does not extend beyond. Schlosser vs. Cruickshank, 96 Iowa 414; Schlosser vs. Hemphill, 118 Iowa 452. As to whether the land within the meander lines is swamp land or not is not conclusively settled by the act of the surveyor. Rood vs. Wallace, 109 Iowa 5. And in general, to the effect that the running of the meander line does not conclusively establish the character of the area beyond the meander line." (p. 158.)

"We conclude, therefore, that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line, and that the tracts of land thus conveyed by the government have never been extended

by accretion or reliction so as to include any portion of the bed of this supposed lake." (p. 159.)

The decision, therefore, was that the land granted by the Government patent was bounded by the meander line and did not extend to the edge of the lake at all. It is too clear for comment that no riparian rights were or could have been involved in the case.

Still the Court said, *arguendo*, in its opinion:

"But in this state the title of abutting owners on waters which are meandered is held to extend only to high water mark, *the title of the bed being in the state*. Wood vs. Railroad Co., 60 Iowa 456; Serrin vs. Grefe, 67 Iowa 196; Noyes vs. Collins, 92 Iowa 566. As to whether, under a patent from the United States, the title extends to the center of a stream or lake, or is limited to the margin thereof, is held by the United States Supreme Court to be dependent on the law of the State." (p. 156.)

It will be observed that this language applies to all meandered waters, navigable or non-navigable. But it is an inaccurate statement of what the Court had in fact ever decided or intimated. The authorities cited by the Court in support of the proposition show this.

Wood vs. Ry. Co., 60 Iowa, 456, and Serrin vs. Grefe, 67 Iowa 196, were cases of navigable water; both involved land bordering upon the Des Moines river. There it was held that in cases of navigable water the title of the riparian owner extended only to high water mark.

Noyes vs. Collins, 92 Iowa 566, we have already had occasion to consider. In that case the Court simply approved of the ruling in the Wisconsin case cited, "that the title of the riparian owner upon a natural lake or pond does not extend *beyond the natural shore*." This was dictum; for, as we have seen from the case itself, the County held the title to the bed of the lake under the swamp land grant. The only question was whether the description in its deed carriedi ts grantee, Noyes, beyond the meander line mentioned therein, and it was held that it did not.

The same is true of the subsequent case of Noyes vs. Board of Supervisors, 104 Iowa, 175. That case simply followed the Noyes-Collins case upon substantially similar facts.

It is true that in a former case involving so much of the very lands here in controversy as the land between the meander line and the lake, wherein this plaintiff in error was plaintiff—but there was a different defendant—the Supreme Court of Iowa held that plaintiff's title and rights were not bounded by the meander line but extended to the high water mark of the lake. In that case, however, plaintiff's contention was that "he owned to the water's edge." (See p. 417.) Nothing more was involved. The Court said:

"In the determination of these cases, we have borne in mind the fact that in Schlosser's case the meandered line at no place touched the high water mark of the lake, and that in some other respects the facts are slightly different from those relating to the other two cases. These differences, however, are not material, and the same rules must govern in the determination of all three cases. Plaintiffs are riparian owners, and as such, they take title to all of the land lying between the meandered line and the high water mark of the lake."

Schlosser vs. Cruickshank, 96 Iowa, 425.

In Grant vs. Hemphill, 92 Iowa, 218, the Court said.:

"Where it appears that the government intended to sell all the land to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant, to the water's edge." (p. 224.)

"A riparian proprietor is one who owns land bounded upon a watercourse or lake. The evidence in this case shows that there was not at the time of the government survey, and is not now, *any body of water* east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner." (p. 224.)

And because there was no such water the plaintiff was held to be confined to the meander line as a boundary.

This being so, it follows conclusively that the remark above quoted relative to a riparian owner taking to the water's edge was *arguendo* and pure *dictum*. It was based upon nothing which was in the case being decided.

So in Ladd vs. Osborne, 79 Iowa, 93,

decided in 1890, plaintiff's land was a bounded by a meander body of water called "Goose Lake." The Court said:

"The meander line is not a line of boundary. It is made for the purpose of ascertaining the quantity of land in the tract bordering on the lake or stream. Kraut vs. Crawford, 18 Iowa, 549; Musser vs. Hershey, 42 Iowa 536. Under the rule of these cases, the plaintiff is a riparian owner, and his land *extends to the lake.*"

In this case ,however, nothing was involved but the land lying between the meander line and the lake. Plaintiff claimed that land and got it. He claimed nothing more. No question as to the bed of the lake was decided. The two cases cited; Kraut vs. Crawford and Musser vs. Hershey, involved land on the Mississippi river, navigable water, and the Court held that the riparian owners took to *high water*.

Such are the decisions of the Supreme Court of Iowa as to the title of a riparian owner bordering upon a river or lake extending "to the bank," "to high water," or to "the water's edge."

They resolve themselves into cases where nothing was in controversy beyond that.

It is clearly apparent that the Supreme Court of Iowa has never decided that the beds of non-navigable lakes vest in the State of Iowa. On the contrary, it has been careful not to so decide.

Thus, in a case already quoted from extensively, the Court said:

"What we have already said practically disposes of plaintiffs' claims by adverse possession of portions of the lake bed. *Whether the title to the bed remained in the United States or passed to the state*, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign."

Carr vs. Moore, 119 Iowa 159.

And in a case decided in 1902, where the plaintiff claimed the bed of a lake under the swamp land grant, and the trial court "entered a decree to the effect that neither plaintiff nor the defendants had any title to the land, *the real ownership being in the* state." (p. 253) the Supreme Court said:

"The holding of the district court that the state is the real holder of the title to these lands we need not review. The plaintiff not being entitled to recover, it is immaterial, under the record as presented, whether the state has any just claim in the premises, or whether defendants have obtained title by reliction of the waters of the lake. We do not attempt to pass upon either proposition. The defendant claimed no relief by cross bill or petition. Hence, when plaintiffs' title was disposed of, that was an end of the case."

Ogden vs. Buckley, 116 Iowa, 357.

In that case there was a controversy as to the real character of the lake, which had originally covered the land involved in the suit, and after holding that plaintiffs had no title under the swamp grant because the land had never been selected or patented under that grant, the Court said further:

"An attempt at this time to prove conditions existing at so remote a period must necessarily involve much uncertainty. But few witnesses remain who can speak of their actual personal knowledge and observation, and those few labor under the inevitable infirmities of age and memory. The great changes which have taken place within the memory of the younger men in the wet lands and inland waters of the west forbid relying upon present conditions as proof of facts existing more than half a century in the past. *The record of the surveys then made and approved by the Land Department of the government carry with them a presumption of correctness,—a presumption which, in the opinion of the writer, should at this late date be well-nigh conclusive.*"

Ib. 357.

This decision was made April 12, 1902, less than two months prior to that of the case at bar which was decided June 3, 1902. (Record p. 125.) Its bearing on this case will be considered later.

Summarizing these cases we find (1) that none of them decide or purport to decide the effect of a government patent for land fronting upon a non-navigable meandered lake in Iowa so far as relates to title to the bed of the lake; (2) that none of them decide that a government patent under such circumstances does not convey title beyond the water's edge.

The lake bed cases are

(1) Noyes vs. Collins, 92 Iowa, 567, where the bed of the lake involved was on a certain section 15, and the Court said (p. 567): "Section 15 is a part of the swamp land grant from the United States to the State of Iowa, and from the State of Iowa to Harrison County." The controversy was between subsequent grantees of the County. It was held that plaintiff under the special facts, and special description in the deed from the County under which he claimed, took only to the shore of the lake. It was said (p. 569) that this "seems, *in view of the particular facts of the case*, equitable."

(2) Noyes vs. Board of Supervisors, 104 Iowa 175, was a case involving a title to the bed of the same lake, under deeds from the County. "All parties claimed through the swamp land grant of 1858." The facts were found by the Supreme Court to be substantially the same as in the Noyes-Collins case and on the authority of that case the decision was the same. Furthermore, in the last case contemporaneous construction of the deeds from the County was shown in that it had "from time to time for many years, surveyed portions of these lake beds, has platted the same in lots, and sold said lots to various parties." (p. 175.)

(3) Rood vs. Wallace, 109 Iowa, 5-14, was where Owl Lake had been partially drained, and the lands uncovered had on application of the state by its governor, been patented to the state as swamp lands. The state had patented these to the county, and the county had conveyed the same away. The controversy was between plaintiff, claiming remotely under the conveyances from the county, and the defendants who claimed the lands were subject to preemption and homestead, but they had made no entries. It was held that plaintiff's title was good against these "squatters." Riparian owners under the original government patents of meandered lots around the lake were not in the case. The Court said (p. 9 bottom), "no re-survey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title."

The state intervened and set up title to the bed of the lake. It was held that it had no interest. The Court held that the finding of the Land Department, that the land was swamp land under the act of 1850, and *not the bed of the lake*, was conclusive on the state. Nothing more was or could be decided in this case. The holding that the uncovered lands were not a part of the bed of the lake ended the claim of the State. What was said *arguendo* as to "assuming" that the title to beds of lakes, "especially those of *navigable* lakes" was in the state was not decision.

(4) Carr vs. Moore, 119 Iowa, 152, was where plaintiff claimed portions of a lake bed by "accretion or reliction." The defendant claimed under the swamp land grant. The Court held as to plaintiff that no accretion or reliction was shown. They also claimed to the center of the lake, under the original government patents. The Court said, "there was at the time of the original survey no lake, in the proper sense of the term" (p. 157). And that "there was no body of water *proper* to be meandered" (following and citing the case at bar), and hence "that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line." (pp.158-9.) It added that "whether the title to the bed remained in the United States or passed to the state no adverse possession thereof would be effectual" (p. 159), showing that there was no attempt to decide in that case, whether the title to the bed of the lake was vested in the State of Iowa.

As to defendants claiming under the swamp land grant, it was held that no title was shown because there had been no selection or patents issued under such selection. Hence relief was denied to both parties.

(5) Nor did the Supreme Court of Iowa decide the question of title to the bed of the lake in the case at bar. Here plaintiff must recover upon the strength of his own title. What that Court did decide was that Mud Lake was not "proper" to be meandered; that for this reason the meandered line was a boundary line, and that Schlosser did not take beyond it. The Court said:

"But, where there is no adjacent body of water proper to be meandered, the rule we have mentioned will not apply. In such a case the meander line will be a boundary line, and one who purchases from the government according thereto can not claim title beyond it. We have, then to determine whether there was a body of water in section 30 proper to be meandered." * * * *

"We are equally clear that no permanent body of water of any considerable extent existed there." (p. 455.)

"If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent

lake proper to have been meandered, we might, perhaps, reach a conclusion on the facts in harmony with our former opinion; but the evidence before us precludes this." * * * *

"The fact that plaintiff claims beyond the shore line, when taken in connection with the testimony going to show *that the greater part of such body of water* was but temporary in character, is sufficient to convince us that no meander line should ever have been run here. ———————————————————————————————." * * * * * (p. 456.)

"We are further inclined to believe that when the meander line deviates so far from the true shore as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a re-survey." * * *

"It appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud Lake is shown on the plat to be." (p. 457.)

Schlosser vs. Hemphill, 118 Iowa, 452. (Record pp. 127-8.)

When the Court had decided therefore,, that the body *of water was "not proper to be meandered,"* and hence that the meander line was a boundary line beyond which plaintiff took nothing, it had decided the whole case. There was nothing further for decision except plaintiff's claim of title by adverse possession. As to that it was said:

"So long as title remained in the United States, the statute of limitations would not run (citing authorities). This land was not surveyed until the year 1898. Before t was laid out into legal sub-division, neither state nor county could make a selection or assert any title to it."

This was as to the land being swamp under the re-survey of 1898.

118 Iowa, 458. (Record p. 129.)

If, therefore, the Court did decide anything as to the bed of the lake, such decision was that the lands were swamp land and that the title remained in the United States until the re-survey and patents to the state thereunder.

In this condition of the case the Court decided nothing when it says *arguendo* (Record pp. 127 bottom, 128 top),

"If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was is far south of the half sec-

tion line according to all the testimony. Beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake.

Rood vs. Wallace, 109 Iowa, 5.
Noyes vs. Board of Supervisors, 104 id. 174."

And, moreover, as we have seen the two cases cited do not decide the proposition "that beyond this shore or margin plaintiff's title could not extend if that body of water was a permanent lake." The lake in Noyes vs. the Board of Supervisors, 104 Iowa, 174, was not a permanent lake. And the boundary line there was determined with reference to the peculiar facts in that case.

Rood vs. Wallace, 109 Iowa, 5, was the case where the Court itself took particular pains to point out that the rights of no riparian owners were in any manner involved.

The Supreme Court of Iowa, therefore, never has decided where the title to the beds of non-navigable lakes in Iowa is vested. So far as the effect of a government patent to a riparian patentee is concerned, that is open to question.

No more has it decided that a riparian owner of such lakes does not take title under a patent from the United States to the center of the lake, nor has it decided that under such patent the title of the riparian owner extends only to the shore of the lake.

(1) We need not further comment on Rood vs. Wallace, and Noyes vs. Board of Supervisors, just referred to, *supra*.

(2) We have seen that Noyes vs. Collins, 92 Iowa, 567, did not involve the effect of a government patent, and that the holding there that plaintiff took only to the shore of the lake was in the case of a private grant decided under special facts, and where both parties claimed under the same government patent which had been issued under the swamp land grant.

(3) Also, the case of Grant vs. Hemphill, 92 Iowa, 218, involving land in section 19 immediately north of section 30 in which the land in controversy in the case at bar is situated. Section 19 was a part of the same government survey, as section 30. The Court, in deciding that case, said:

"This township was surveyed by the United States in the year 1855, and the sub-divisions of the township were surveyed in 1857." * * * * * * * * * *

"The land in controversy is that marked on the government plat as under water, and the last line described is what is known as a 'meander line.'" (p. 220.)

"It appears from a very decided preponderence of the evidence that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the wit-

nesses testify that the inlet of Mud Lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land, upon which to base a meandered line. Some of the land, like all bodies of land in that country, is low, flat, and marsh land, but the evidence shows that a greater part of the land claimed by Eaton is dry, tillable land, and that if it had been surveyed it would not have passed to the state under the swamp land grant." (pp. 221-2.)

"A riparian proprietor is one who owns land bounded upon a watercourse or lake. The evidence in this case shows that there was not at the time of the government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner." * * * *

"There is not, and has not been, any body of water upon which to locate a meandered line." (p. 224.)

"The meander line and the banks of a stream or shore of a lake can not be held to apply where there is no body of water to which it can be referred." * * * *

"As we have said, there is no body of water anywhere within the boundary of the section to authorize any extension of the area of the lots which the government sold, and which plaintiff now owns." * * * *

"We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title except through the regular government methods adopted by the general government for the disposition of the public lands." (p. 225.)

This case, therefore, does not determine any such principle of law as that the holder of a patent on a non-navigable lake takes to the shore of the lake. It was decided on the fact that "there is not and has not been any body of water upon which to locate a meander line."

It is cited in the case at bar in support of the "proper to be meandered" invention, but it has no bearing upon that novelty.

(4) Noyes vs. Board of Supervisors, 104 Iowa, 175, simply followed the prior Noyes-Collins case under the same facts. There the court said the parties claimed through the swamp land grant of 1850; and as already shown, *supra*, the case depended upon special facts and a special boundary line set out in plaintiff's deed of private grant. The facts, moreover, showed a contemporaneous construction in that plaintiffs' grantor, the County, had for many years surveyed and sold lands in the bed of the dried out lake to which plaintiff claimed title.

(5) Rood vs. Wallace, 109 Iowa, 8, was the Owl Lake case where no question of riparian ownership was involved. The Court said:

"Purchasers of lots abutting on the meandered line, or otherwise directly interested, are, it seems to us, the only persons who may object to the re-survey; and no resurvey will be permitted which will in any manner prejudice their interests. They, as we have seen, are not made parties to this suit, and are making no objection to plaintiff's title." (pp. 8-9.)

(6) Ladd vs. Osborne, 79 Iowa, 93, was where the plaintiff whose land adjoined a meandered body of water called "Goose Lake" claimed to the shore of the lake including land between the lake and his meander line. His claim was sustained. Nothing more was involved. It is not an adjudication that his line stopped at the shore of the lake, nor that it did not extend into the bed of the lake. Those questions were not involved.

(7) Carr vs. Moore, 119 Iowa, 159, was where the Court held that plaintiff did not take title beyond his meander line by accretion or reliction, and that "it is apparent that there was at the time of the original survey *no lake* in the proper sense of the term such as to give occasion for the application of the doctrine of accretion and reliction." And also held that the body of water was not "proper to be meandered."

There was dictum in that case as to taking title to the shore of the lake (p. 158 bottom.) But as to that the Court said:

"If there is no body of water corresponding to the meander line to which the ownership of the holders of the adjoining sub-divisions can extend, then the meander line limits the extent of the land conveyed. We conclude, therefore, that the original government patents to the lots now owned by plaintiffs did not confer any ownership beyond the meander line." (p. 158-9.)

There is nothing in this case upon which to base any claim that the Supreme Court of Iowa has, by *decision*, confined the holder of a patent for meandered lots along non-navigable lakes to the shore of the lake, or to the water's edge.

From this analysis of the cases it will be seen that no such proposition has ever been dicided by the Supreme Court of Iowa. The question, under its decisions, remains an open one, like the question of ownership of the beds of such bodies of water.

That this Court will not accept such dicta of the State Court, or what it may say *arguendo*, on the question of title to beds of non-navigable lakes, is conclusively decided in

Hardin vs. Jordan, 140 U. S. 385 and 387.

III

AS TO MUD LAKE.

The Supreme Court of Iowa does not decide or hold in its opinion in the case at bar that Mud Lake is not a permanent body of water. Stating what it proposed to decide, that learned tribunal said:

"We have then to determine whether there was a body of water in section 30 proper to be meandered" (Record p. 127); and deciding that proposition thus propounded the Court said:

"The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the *greater part of such body of water was but temporary* in character, is sufficient to convince us that no meander line *should* ever have been run there." * * * * Yet it appears beyond question here that the meander line was not correctly run in the first instance, and *we think* it is *satisfactorily* disclosed that no body of water *necessary to be meandered* then existed where Mud Lake is shown on the plat to be." Record p. 128.)

It was on this ground that plaintiff's claim to the bed of the lake was decided in the Court below. The Court, however, concedes the existence of the lake. Thus, it says,

"It is undisputed that the meander line did not correctly indicate the shore line of the lake, as it was originally run. In the former case we found on the evidence then before us, that there was a tract of about one hundred acres between said line and the actual shore of the lake." (Record p. 126.)

And "from a careful reading of it (the evidence) * * * * the meandered lake which gives rise to this controversy is called 'Mud Lake,' and it must be manifest from what we have said lies north of plaintiff's land." (Record p. 127.)

And again: "The south shore of the body of water, such as it was, was far south of the half section line according to all the testimony. * * * * The fact that plaintiff claims beyond the shore line, when taken in connection with the testimony going to show that *the greater part of such body of water was but temporary* in character, is sufficient to convince us that no meander line *should* ever have been run here." * * * *

The record in this case shows a permanent lake substantially without conflict or controversy. Thus, the Secretary of the Interior, in ordering a re-survey, says:

"From the official plat of said township it appears that the lake extends into four townships, viz., 96 and 97, ranges 34 and 35, and is about five and one-half miles long, and from half a mile to a mile and a half in width." (Record p. 75.)

And in approving the re-survey he said:

"With his report Mr. Barber submitted a plat showing the land in question is mostly agricultural in character, with a marshy pond, called Mud Lake, covering portions of sections 25 and 30, with an outlet going west into Trumbull Lake. (Record p. 76.)

Turning to Mr. Barber's resurvey here referred to, made in 1898, we find him saying in his field notes:

"Proceed to the outlet of Mud Lake in section 25 and set instrument in graded road near bridge. Telescope is 9.95 ft. above water level of Mud Lake and 9.02 ft. above bottom of dry run or natural ditch 2 to 5 ft. wide on west side of road. Hence a rise of 7 inches *in the pond* would cause water to flow in said outlet, westward and a rise *of two feet would cover the broad grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

Not only does the Secretary of the Interior state that Mud Lake has "an outlet going west into Trumbull Lake," but the evidence in the case all shows this, so that when Mr. Barber states that "a rise of seven inches in the pond would cause the water to flow in said outlet westward," he means that the then existing pond or lake which he found there on section 30 would, under such circumstances, empty westward into Trumbull Lake.

As to this Trumbull Lake, the defendant himself testified:

"I am somewhat acquainted with Trumbull Lake, and with the outlet of Mud Lake into Trumbull Lake. Mud Lake is higher than Trumbull Lake. The outlet of Trumbull Lake is in the Sioux River. * * * * It is about a half mile from Mud Lake to Trumbull Lake." (Record p. 85.)

M. S. GREENE testified:

"Trumbull Lake is larger and covers a good deal more surface than Mud Lake and is a deeper Lake. * * * * Trumbull Lake is in Clay County about a mile and half from Mud Lake." (Record p. 16.)

Such a body of water is permanent so far as natural conditions are concerned. It may be removed, like most non-navigable lakes, by artificial means, and by the industry and engineering skill of man. We suppose, however, that a permanent lake is one which will remain indefinitely in the absence of agencies of this character. It would seem to be enough that this lake has apparently existed through the ages since the glacial period, and that it still exists. Of course it has been modified by the action of man in cultivating the surrounding lands. The evidence shows this clearly. But it still remains. The plat accompanying the field notes of the resurvey (See Exhibit 2, Record p. 73) shows the actual margin of the lake at the present time. It remains on the west line of section 30 a half mile wide as it was at the time of its

survey and meander in 1855. The margin depicted by Barber in 1898 corresponds exactly with the meander posts and lines set and run in 1855. From that point the lake, as depicted by Barber, extends northeast nearly to the northeast corner of section 30. At the geographical center of the section it is practically 80 rods in width. It runs nearly along the half section line from about the west line of the section, eastward to very near the geographical center of the section.

Another surveyor, J. T. Painter, made for defendant in 1897, a survey of section 30 and made a plat of the lake. (See Record 44, Exhibit 21.) On that plat he lays down "edge of high water," and shows Mud Lake to be practically the same as indicated by Barber's plat of the survey. He was asked, "What is there with reference to the bank of Mud Lake on this plat?" and answered, "There is a blue line represents the edge of high water." (Record p. 42.) He certainly had no doubt of the existence of Mud Lake for he speaks of it repeatedly.

All of the witnesses in their testimony as quoted *supra*, agree that all lakes in that portion of Iowa have been gradually receding for twenty years as land has been reduced to cultivation, and has absorbed the water which formerly ran off the tough prairie sod into the lakes, sloughs and watercourses.

M. S. Greene testified (Record p. 15) that the lakes in that locality have receded three feet.

M. L. Parr testified *for defendant*, and he is not contradicted, "All the lakes up north there, Lost Island Lake, and all the other lakes, were higher twenty years ago than in later years. Lost Island was three or – feet higher. And Mud Lake correspondingly high. (Record p. 46.)

And the surveyor, Painter, who was in Iowa in 1857, and testified for defendants, shows that 1857 was a wet year, there having been extremely heavy shows that winter; but he says: "I do not know how it was in 1857 when the survey was made (in July); except the Island and the point *it might all have been covered by one continuous body so far as I know.*" (Record pp. 53-4.)

Besides, the evidence shows, also without dispute, that there were springs in the bed of the lake, and an inlet coming in over section 19 north of it which drained a large area of country. This inlet was undoubtedly a slough with a grassy bottom, as decided in Grant vs. Hemphill, rather than a lake or a well-defined creek.

The field notes of Barber's resurvey are very significant. "A rise of seven inches in the pond (Mud Lake on section 30) would cause water to flow in said outlet westward, and *a rise of two feet would cover the broad, grassy flat on each side of it west to Trumbull Lake.*" (Record p. 81.)

The undenied fact, testified to by defendant's witness, Parr, is, that in the last twenty years Mud Lake with the other lakes in that part of Iowa, has receded three to . . . . feet, (Record p. 46) which means three feet and more. This shows with three feet added to the lake level at the time of the resurvey in 1898, that in 1857 when the government sub-division was made, all of section 30 meandered out, must have been a continuous sheet of water; and that extending west to Trumbull Lake, a distance of 1½ miles, was a broad sheet of water, covering the broad flat spoken of by Barber's field notes, with a still larger portion of Mud Lake on section 25, west of section 30. Moreover, 1857 was a wet year. Water poured into the lake from a great area to the north. The field notes and plat of the government survey then made show that on the south Lost Island Lake opened into Mud Lake. (Exhibits E and F, Record, 11). Under such undisputed facts, to hold as a proposition of law that Mud Lake "was not *proper* to be meandered," is to make a collateral attack on the government survey and patents thereunder nearly fifty years later, which surely can not be permitted in favor of a venture to divide such lands as can be thereby secured between a swamp land claimant and its attorney in the speculation.

Why should the government surveyor in 1857 have carefully meandered the east margin of Mud Lake over on section 29 if there was no lake there on section 30, and w th much less work he could have run the east line of section 30 straight through from the southeast to the northeast corner?

In its opinion the Court below cites "Ogden vs. Buckley, *d cided at present term*," (Record p. 129 top) and the case at bar is a good case for apply ng the rule there laid down. The Court said:

"An attempt at this time to prove conditions existing at so remote a period must necessarily involve much uncertainty. But few witnesses remain who can speak of their actua! personal knowledge and observation, and those few labor under the inevitable infirmities of age and memory. The great changes which have taken place within the memory of younger men in the wet lands and inland waters of the West forbid our relying upon present conditions as proof of facts existing more than half a century in the past. The record of the surveys then made and approved by the land department of the government carry with them a presumption of correctness,—a presumption which, in the opinion of the writer, should at this late date be well-nigh conclusive."

Ogden vs. Buckley, 116 Iowa, 357.

This is squarely in conflict with the case at bar, which strikingly illustrates how weak and illusory are government surveys, patents and titles based thereon, if courts a half cen-

tury later may search their own inner consciousness for legal reasons to declare a lake not "proper" to be meandered. Especially is this so where *its own former decision regarding the same land* is thus overturned, and its own decisions are thus made more conflicting than the verdicts of successive juries. This Court has often expressed itself in no uncertain terms as to thus collaterally assailing and overturning government titles, and the intolerable mischiefs of such conflicting decisions. We quote a single case which is peculiarly applicable:

"It is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. vs. Kemp, 104 U. S. 641.

Nor does the Court below strengthen its position when it declares, "It appears beyond question here that the meander line was not correctly run in the first instance." (Record p. 128.)

We are to take the case upon the presumption, sustained by the undisputed facts, that the lake at the time of the survey was a sheet of water extending over the whole of section 30, except the meandered lots, and extended east upon section 29 as shown by the meander lines on that section.

Much must necessarily be left to the discretion of the surveyor in running meander lines. He is on the ground confronted by actually existing physical conditions. This discretion under all the cases is not to be reviewed by the courts a half century later upon new conditions then existing. In a case of gross fraud, where no actual survey was made at all, as in the Minnesota case, Security &c. Co. vs. Burns, 192 U.S., 167. Or, in a case where permanent conditions show gross fraud, as in the Oregon case, where no body of water existed north of the land meandered, French-Glenn Co. vs. Springer, 185 U. S., 47, or, probably in a case where the mistake is so gross that it can

only be accounted for by presuming corrupt or fraudulent motives, the courts may review the reported surveys as in the case of any other absolutely void action on the part of a public officer. But where the case is purely one of discretion in meandering an actually existing body of water, the discretion exercised can not be impeached because the surveyor could not look ahead fifty years and tell what the conditions might be regarding such water when the whole face of the country had been changed by the industry of man; nor can such discretion be reviewed because the surveyor did not correctly judge as to the depth of the water by which he was confronted, extending, as it did then, in a continuous sheet over miles of country, and connected, as it then was, with Lost Island Lake on the south by an opening of twenty rods or more, and with Trumbull Lake on the west by a broad and continuous sheet of water.

Taking conditions as they then existed, the only deviation ~~marked~~ marked from the shore of the lake of the meander line—a line of nearly one mile in length—was in cutting off a point of land near the west line of this section which extended into the lake like a thumb, by running across the base of the thumb instead of following its sinuosities out around the north end of this protuberance. The evidence shows that this point of land contained twenty-three acres. The land at that time was worth little or nothing. Is the discretion of the surveyor in running his meander line to be impeached by the courts, and the government survey and patent to be upset because of this action? To state the proposition, is to stamp its absurdity.

Passing that point the surveyor had to descend into wet land at the dividing line between lots 2 and 3. In doing this he did not follow the sinuosities of the shore, but, as the evidence shows, ran along a ridge of dry land, running mathematical lines from point to point, and leaving some dry land there between the meander line and the lake. It is clearly absurd to say that this warrants any impeachment by the courts of the discretion vested in him. In running the line from the wet point between the two lots, his line again extended northerly around a point of drier land. Probably he did not follow the exact shore in running this portion of the meander. The subsequent surveys in evidence show that he included some wet land and excluded some dry land. (See Exhibit G for plaintiff Record p. 12). Yet nothing of this kind can justify a court after the lapse of many years in attempting to impeach the discretion and action of the surveyor by declaring "it appears beyond question here that the meander line was not correctly run in the first instance." This is not merely a finding of fact. It is an assertion as well of the legal power in the courts to impeach collaterally and overthrow the legal discretion vested in the surveyor in performing his duties in

the field. It appears from the case of Schlosser vs. Cruickshank, 96 Iowa, 414, as to conditions then existing as declared by the Supreme Court of Iowa.

"The meander line run by the government surveyors touches the shore line of the lake in one or two places only, and then so runs as to leave in Schlosser's case about one hundred acres of land between said line and the actual shore line of the lake." Yet this did not shock the Court as it then existed, for it held that Schlosser was entitled to this land. And it said:

"The rule of the cases cited from this state is that, as a meander line is not a boundary line, the owner of land adjoining such meander line takes title to the high-water mark of the stream or body of water, if navigable, lying adjacent thereto. In other words, in such cases the adjacent proprietor is a riparian owner, whose title extends to and embraces all land lying between such a meandered line and the high-water mark of a *navigable* stream or other body of water; and such, we may say, is the general holding. In some states it is held that the rights of such riparian owner extend further, and embrace all land lying between the meander line and the center of the stream or body of water, as the case may be."

Schlosser vs. Cruickshank, 96 Iowa, 418.

And it added:

"For the purpose of determining the matter now in controversy it is not material that we discuss the questions as to the ownership of the land under the lake, or refer more fully to the cases relating thereto."

Ib. 419.

In other words, the title to the bed of the lake was not drawn in question in that case. Schlosser claimed only to the shore of the lake.

It is obvious that a meander line so run that the Supreme Court of Iowa, as constituted in 1895, sustained the line with a full showing before it as to the facts and the land meandered out between the line and the shore of the lake, is not a case which involves gross or corrupt abuse of discretion on the part of the surveyor; nor a case of such gross or palpable error as to warrant the same court as constituted in 1902—seven years later—in overhauling and overturning the discretion and action of the surveyor, and in rendering a conflicting decision which holds the meander line for naught.

There must be—in other words—something more gross in the action of the surveyor than that which the court sustains at one time, and overturns upon criticism and judicial condemnation a few years later The change of four out of six members of the court in the meanwhile can not warrant the last result in order to overturn a government survey and

patent. The facts should be such, not only that the same court at all times, bu. that all other courts at all times should be able to say without hesitation that a government patent and survey ought to be open to collateral impeachment in this summary manner. Nothing short of this we submit can justify bringing government titles into disrepute and doubt by such belated collateral attacks, and that, too, in the interest of speculative ventures based upon digging up latent defects in titles as against the actual and meritorious settler who has acquired the land as a homestead, and his successors in interest.

It is obvious that the title must be settled upon the facts as they existed at the date of the survey, and as they addressed themselves to the discretion of the government surveyor at that date. The government patent issues with reference to those facts and not with reference to changed conditions many years later. For, not only have lakes changed in Iowa, but rivers have changed in Iowa. The Des Moines river, to illustrate, was originally navigable. A vast land grant was made by Congress to improve its navigation. At one time—it is a matter of well-known Iowa history—steamboats ascended the river as far as Ft. Dodge. So the Cedar river was originally navigable as far as Waterloo, and a very considerable traffic was carried on by steamboats, as far north as that point. The waters in these rivers have receded The Cedar river has become non-navigable in fact; the Des Moines river has been declared non-navigable by act of Congress. Nevertheless, riparian owners on the banks of these rivers do not extend their title to the middle of the river because of such change. They still take to ordinary high-water mark only. This has been expressly decided by the Supreme Court of Iowa.

Wood vs. Ry. Co., Iowa, 456.
Serrin vs. Grefe, 67 Iowa, 196.

So, the fact that the waters in Mud Lake have receded can not affect the original meander lines of that lake, and can not change the title of a riparian owner to the middle of the lake, if he took such title under his patent and the government plat and survey with reference to which his patent was issued.

Under the facts shown the survey of 1857 and meander lines are conclusive.

U. S. vs. Valljo, 1 Wall., 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52 and 54.
Smelting Co. vs. Kemp, 104 U. S., 641.
Russell vs. Maxwell, &c. Co., 158 U. S., 253.

And, as declared by the Court below in the opinion in this case,

"When a body of water is meandered, such lines are not run as boundaries, but merely for the purpose of defining the sinuosities of the shore and as a means of ascertaining the quantity of land to be paid for by the purchaser.

Schlosser vs. Cruickshank, *supra*,
and authorities therein cited.

In such a case if the meander line does not coincide with the bank of the lake, but is so run that land lies outside and between it and the shore, adjoining owner will usually take title to the actual shore line, at ~~east~~ last." (Record p. 126.

And see—

Schlosser vs. Cruickshank, 96 Iowa, 549.
Kraut vs. Crawford, 18 Iowa, 549.
Musser vs. Hershey, 42 Iowa, 356
Steele vs. Sanchez, 72 Iowa, 68.
Ladd vs. Osborne, 79 Iowa, 95.
Grant vs. Hemphill, 92 Iowa, 218.
Case at Bar, Record 126.
Hardin vs. Jordan, 140 U. S., 380.
Horne vs. Smith, 159 U. S., 43.
Railroad Co. vs. Schurmeir, 7 Wall. ~~43~~ 272.

IV.

THERE IS NO ISSUE AS TO WHETHER THE LAKE WAS "PROPER" OR "NECESSARY" TO BE MEANDERED, NOR WHETHER THE MEANDERED LINE WAS CORRECTLY RUN.

The issues tendered by the answers were:

"As to whether said lots were meandered, defendant has not sufficient knowledge to form a belief, and denies the same. The defendant denies that such meander lines were run with reference to a lake then existing in part upon section 30." (Record pp. 2 and 6.)

This in no manner raises the question as to whether the meander line was correctly run, if run at all. And in no manner raises the question as to whether the lake was "proper" or "necessary" to be meandered if the meander lines were run "with reference to a lake then existing in part upon section 30."

Both of these were special matters and special issues not inhering in the general denial. If relied upon they should have been pleaded in avoidance of plaintiff's claim that "said lots were meandered by the government surveyor, and said meandered lines run with reference to a lake then existing in part upon said section, and the plat as made by the said surveyor, and filed for record as aforesaid, shows the meander line to coincide with the shore line of said lake, and shows

no reservation between said meander line and the lake." There was no such pleading in avoidance in the answers. The defendants did not rely upon any such matter.

How, then, could the court below make these issues in avoidance, which it raised itself for the first time on appeal, not only the controlling and decisive issues in the case, but grounds for collateral attacks upon the survey and patent? If the court below was at liberty to do this, it would naturally decide its own issues in its own favor. In this manner a new method would appear to have been invented for the most summary and collateral of all imaginable attacks upon government patents and titles, with no opportunity to plead to the same, or introduce evidence as to the same, or for even so much as a hearing on argument touching the same. It may, of course, be conceded, however, that argument would have done no good. The opinion shows that these matters were decided when the non-existent and supposititious issues were formulated and stated by the court below.

It results what whatever the court below may have stated regarding the law or the facts relating to these supposed issues is extra judicial, and an attempt to pass upon matters not submitted to its jurisdiction or decision by the pleadings in the case. See authorities cited in Division IV of Brief of Points, *supra*.

The other issues set up by the answers relate to the rights of defendant Hemphill as a purchaser under the swamp land grant and re-survey, and the right of defendant Ryan to enter lots 12 and 13 of the re-survey as a homestead.

These are decided in favor of defendants upon the assumed issues raised by the court.

V.

Title as to Bed of Lake.

Schlosser's distinct claim in his petition to the land as far north as the south half of section 30 extends, distinctly raises the effect of the patent under which he claims as a conveyance of all that portion of the lake.

This question, as we have seen, the court below did not decide in terms. It denied his title as thus claimed under the laws of the United States, and under authority exercised under the United States in the issuance of the patent under which he claims, and in making the survey, field notes, and plat upon which his patent is founded. Because of the denial of his rights thus specially set up as to the effect of his patent under the laws and official action of United States officers, we submit that the jurisdiction of this court clearly and undeniably exists in this case. This jurisdiction can not be defeated because of the extra-judicial action of the Supreme Court of Iowa in denying plaintiff's claims because of supposed but

really non-existent issues under the pleadings.

As the jurisdiction of this court attaches, we assume that it will decide the claim of plaintiff as made, which presents a federal question, and that it will decide the question as made and as presented for determination by the pleadings of the respective parties. The authorities as to jurisdiction are cited *infra*.

That question is: Does Schlosser, under the government patent of lots 2 and 3, take title to the center of the lake, or to such portion of the bed of the lake less than that as he distinctly claims? The question as to the bed of the lake is a common law question, and under repeated decisions of this court—which we do not think it necessary to cite here—it is to be decided with reference to the law of the State as declared by its own judicial tribunal of last resort if it has been so declared.

We have, however, carefully reviewed the decisions of the Supreme Court of Iowa and have shown, we submit, that that Court has never decided this question.

It must result, as the question involved plaintiff's claim under the laws, authority, survey, field notes and plat of the United States, that this Court, in the absence of such decision, must determine the question for itself. It seems self-evident that plaintiff is not to be denied the title which he thus claims upon suppositious issues in the State Court, and then be denied his title here because the question under consideration never has been decided by the State Court.

In this tribunal the question is free from difficulty. At common law the riparian owner upon a non-navigable lake takes to the center of the lake. And this is true as between the United States and its riparian patentee upon such a body of water, unless the state courts have established a different rule.

Hardin vs. Jordan, 140 U. S., 371.
Kean vs. Calumet Canal Co., 190 U. S., 452.
Hardin vs. Shedd, 190 U. S., 508.

In the last named case this Court said:

"The claim of the plantiffs in error to the land below the original water line depends on its having passed by the patent of the United States. The patent to Holbrook, from which they derive an important part of their title, was dated May 20, 1841, long before the Swamp land Act. *At that time the land under the lake, as well as that surrounding it, belonged to the United States*, and if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds

for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in the former case as in the latter the effect of the grant on the title adjoining submerged land will be determined by the law of the State *where* the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. Hardin vs. Jordan, 140 U. S., 371; Shively vs. Bowlby, 152 U. S., 1, 45; Grand Rapids & Indiana R. R. Co. vs. Butler, 159 U. S., 87, 90, 93; St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners, 168 U. S., 349, 363. (Such cases are not affected by Rev. Stat. Pars. 2476, 5251.) When land under *navigable* water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore. The rule as to conveyances bounded *on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise*, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point."

Hardin vs. Shedd, 190 U. S., 518-19.

The land under a non-navigable lake bed belongs, as here decided, to the United States and not to the state, and, as here decided, "in case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the State so far as its conveyances are concerned."

What is the position of the plaintiff in error as to the bed of the lake? Clearly he will take to the center of the lake as between himself and the United States unless "the general law of the State" prevents this result. But "the general law of the State" in this situation has never been determined by the State Court. It is a purely common law question There is no statutory enactment in the State of Iowa, and none is claimed on behalf of the defendants in error, which in any way bears upon or settles "the general law of the State." What the common law of the State is this Court must determine.

It is the same common law which was declared in Hardin vs. Jordan, *supra*. It is true that this Court, as "a con-

venient, possibly the most convenient way, of determining the effect of the grant," would give effect to a different common law rule if such different rule had been established by the Supreme Court of Iowa. No such conflicting rule of law has been established by the courts of Iowa, and hence the rule laid down by this Court in Hardin vs. Jordan must prevail. In other words, this Court must decide for itself what the common law rule in Iowa is the same as in all other questions where the common law of the State is for determination and the State Courts have not determined it. In most cases, indeed, this Court would determine the common law itself without reference to State decisions. But where title to real estate is involved a uniformity of decisions is desirable and such title ought not to depend upon conflicting decisions between the State and Federal Courts.

We shall assume, then, that the patent under which Schlosser claims carried title to the middle of the lake by virtue of the common law rule established by decisions of this Court. Schlosser, by his petition, claims title to the whole south half of section 30. Does this carry him beyond the center of the lake? In other words, is the north half of section 30 north of such center?

Turning to the plats in evidence it will be seen at a glance that it is not. On the contrary, he might have successfully claimed more, but that will not vitiate his claim to the extent made.

Turning to the plat of the Government survey made in 1857 the case is free from difficulty. (See Exhibits E and F, Record p. 11.) That shows the whole of section 30, except the meandered lot one in the northwest corner and Schlosser's meandered lots two and three, to have been lake at the time the survey was made. The north line of the south half would practically divide the lake on the west line of that section in the middle; extending the north line of the south half of the section eastward from that point, it would take less than half the lake shown by the plat.

Turning to the plat of Barber's resurvey in 1898 the result is the same (See Exhibit 2, Record p. 73); there the line between the north and south half of section 30 is laid down, and it appears to run directly through the center of the lake on the west line of the section. A few rods east of the west line the south "actual margin" of the lake runs along close to the middle line of the section until near the geographical center when it bears off to the northeast which would carry Schlosser's title to the middle of the lake away north of the south half of the section.

The plat of defendant's witness and surveyor, Painter, leads to the same result as the plat of the re-survey. (See Record Exhibit 44.) The small island in the middle of the section shown by the plat of the re-survey (Record 73) as "high

timber," and shown by plaintiff's Exhibit G as "island," would not change the result. This was an inconsiderable body of land containing nineteen acres as shown by the testimony and by plaintiff's plat, Exhibit G (Record p. 12), and is spoken of by nearly all witnesses as an "island." The testimony shows that it was such until the water in the lake receded. It was not worth a separate survey when the government survey was made. It passed under the government patent giving title to the center of the lake.

St. Louis vs. Rutz, 138 U. S., 245 to 251.
Sanford vs. Mangin, 30 Ga., 355.
Kimball vs. Schoff, 40 N. H., 190.
Hardin v Jordan 140 U.S. 384

Or it was like any other dry land lying along the shore, for instance, between the meander line and the center of the body of water meandered. It was too inconsiderable in size, surrounded as it was by water, and of too little value to warrant survey, and was evidently designed to pass by the patent like other dry land north of the meandered line.

VI.

THE RE-SURVEY.

Under the patent to Anthony the plaintiff in error certainly took beyond the meander line to the edge of the water in the lake. Such was the holding of the Supreme Court of Iowa in

Schlosser vs. Cruickshank, 96 Iowa, 414.

Schlosser claimed nothing more in that case; that covered the land then in controversy. The Court there said:

"A meander line is run when a watercourse or other body of water is the external boundary of the adjacent land; and a line showing the place of the water course or other body of water, and its sinuosities, courses and distances, is called a 'meander line.' The general rule adopted by both federal and state courts is that meander lines are not run as boundaries of the fractional tract thus surveyed, but for the purpose of defining the sinuosities of the banks of the streams or other body of water, and as a means of ascertaining the quantity of land in such fraction subject to sale, and which is to be paid for by the purchaser. (Citing authorities.)

"The rule of the cases cited from this state is that, as a meander line is not a boundary line, the owner of land adjoining such meander line takes title to the high-water mark of the stream or body of water, if navigable, lying adjacent thereto. In other words, in such cases the adjacent proprietor is a riparian owner, whose title extends to and embraces

all land lying between such a meandered line and the high-water mark of a *navigable* stream or other body of water; and such, we may say, is the general holding. * * * * For the purpose of determining the matter now in controversy, it is not material that we discuss the questions as to the ownership of the land under the lake, or refer more fully to the cases relating thereto."

Ib. pp. 417, 418, 419.

The decision in the case at bar does not deny the ruling thus laid down. It seeks to take the case out of that rule by holding that the lake was not "proper or necessary to be meandered," and that the "meander line was not correctly run." We have already sufficiently considered those matters.

But as to whether the meander line was correctly run, that was decided in the Schlosser-Cruickshank case, and this is what the Supreme Court of Iowa then said:

"The undisputed evidence is that the shore line of the lake, in fact, never coincided with the meander line as run by the government surveyors; that the banks of the lake are clearly defined, and in many places many feet higher than the water; that nearly all the land in dispute has never been overflowed; and that there is every evidence that the shore line of the lake is now practically the same as it was in 1857, when all of this land was first surveyed. * * *

"Defendants contend that whatever may be the presumption against a meander line being a boundary line, when it is shown that, at the time the survey was made, a strip of land was left between said meandered line and the shore line of the lake, then the meandered line becomes the boundary line of the adjacent owners. The question we must determine is whether the plaintiffs, as owners of the land adjoining the meandered line, take title to, and are the owners of, all the land lying between said line and the shore line of the lake."

Ib. 416–417.

"Appellants urge, however, that, in cases like those at bar, the presumption that the government intended to convey beyond the meandered line, and to the lake, is not conclusive; that it may be overcome by evidence showing a contrary intent. This may be conceded, and still we do not think defendants have shown facts which should be held to overcome such presumption. It can not be said that evidence which merely shows that the meandered line was not, when the government survey was made, coincident with the line of the lake, and that there was then a body of land lying between such line and the high-water mark of the lake, will overcome the presumption. To overcome such presumption would require some evidence to show that the grantor, the general government, had done, or attempted to do, some act inconsistent with the presumption; such as having *previously*" (that is, before the patent,) "surveyed the land in dispute as government land,

or conveyed it to others than plaintiffs' remote grantors, or was in some manner making a claim to the disputed ground. Not an act is shown on the part of the general government inconsistent with the claim and presumption that this land in controversy was intended to and did pass by its patents to the remote grantors of plaintiffs." Ib. 421.

So that court, on full consideration on the first controversy over this land, correctly decided the question as to the effect of the meander line, which it has now, as we submit, erroneously decided in the case at bar. The verdicts of successive juries as to the title to lands under the same patent could not have been more conflicting.

It follows that the dry land north of the meander line which Ryan in the case at bar has entered as a homestead belongs to plaintiff in error under the Anthony patent. This land contains one hundred and one acres. (Record p. 5, Exhibit E.) That is practically the number of acres to which the Supreme Court of Iowa quieted Schlosser's title in the above case of Schlosser vs. Cruickshank. The Court said:

"The meander line run by the government surveyors touches the shore line of the lake in one or two places only, and then so runs as to leave, in Schlosser's case, about one hundred acres of land between the said line and *the actual shore line of the lake.*"

Ib., 416.

The Court in that case further said:

"In the determination of these cases, we have borne in mind the fact that in *Schlosser's case* the meandered line at no place touched the high water mark of the lake, and that in some other respects the facts are slightly different from those relating to the other two cases. These differences, however, are not material, and the same rules must govern in the determination of all three cases. Plaintiffs are riparian owners, and, as such, they take title to all of the land lying between the meandered line and the high-water mark of the lake."

Ib., 425.

In the case at bar the Court below entirely overlooked the fact that the defendant Ryan claims this one hundred and one acres as a homestead, and does not in any manner comment upon or decide that question. In the statement of the case prepared by the Court itself it is said:

"The half section in question, that is such part of it as lies beyond the original meander line, was re-surveyed by the Government in the year 1898 and platted into five lots, of which lots 11, 14 and 16 are claimed by defendant Hemphill, and lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto County, under a patent issued to the State, *under the swamp land grant of* 1850, and which is based upon the re-survey of 1898." (Record p. 126.)

And, as the opinion shows, *deciding the case under the swamp land grant only*, the Court holds against Schlosser's title. Obviously his title is perfect to the land claimed by defendant Ryan as a homestead. No re-survey can by any possibility have any effect as to the land between the meander line and the lake once awarded to Schlosser by the Supreme Court of Iowa, and now taken away from him in favor of a homestead claim which had its inception about thirty years after the inception of Anthony's title under which Schlosser claims. It is certain that no re-survey can affect title or right which has arisen under a former patent. In this case the original plats and survey are conclusive as to the meander line, and, there being clearly a lake to meander, Anthony, at the least, took to the bank of the lake and all accretions.

Live Stock Company vs. Springer, 185 U. S., 54.

And subsequent attempted dispositions of the lands are inoperative and void.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.

That the re-survey was wholly ineffective and without jurisdiction as declared by the Land Department itself, see,

Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 190 U. S., 461.
Grand Rapids, &c. Co. vs. Butler, 159 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.

This rule was accepted by the court below in the decision of the case at bar. (Record p. 126 bottom, 127 top.)

The case of Mitchell vs. Smale, 140 U. S., cited *supra*, is peculiarly in point as to the protuberance of land extending into the lake near the northwest corner of plaintiff's meandered lots. The fact that the meander line cut off this projection at its base seemed to be very persuasive in convincing the court below that the meander line was not correctly run. In the Mitchell vs. Smale case a tongue of land projected into the lake beyond the meander line. The trial court, under a new survey, deprived the holder under the original patent of this tongue of land with other land outside of the meander line. This Court reversed the court below and said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, *or represented so to be*. It is nothing more nor less than taking from the first grantee a most valuable,

and often *the* most valuable, part of his grant. *Plenty of speculators will always be found, as such property increases in value,* to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, *is a cause of vexatious litigation which ought not to be created or sanctioned.* The pretense for making such surveys, arising from the facts that strips and tongues of land are found to project into the water beyond the meander line run *for the* purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow." (pp. 412-13.)

"The existence of such projecting tongue is entirely consistent with the water or lake being the natural boundary of the plaintiff's land, which would include the said projection, if necessary, in order to reach the said boundary. It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary." (p. 414.)

This well depicts the situation of plaintiff in error in the case at bar. His remote grantor, Anthony, entered the fractional lots 2 and 3 of section 30, as a homestead as early as 1869, for his patent was dated 1874 (Record p. 120), and there must have been five years' occupation of the land as a homestead at that time before the patent could issue. When he entered these fractional lots they were in fact a mere tongue of land running out between Mud Lake on the north and Lost Island Lake on the south. (See Government plats, Exhibits E and F, Record p. 11.) The lots were better located for an "Experimental Government Mosquito Farm" than for any

other purpose. They were of so little value that no land speculator had been found to pay the government price for them, or even to enter them with a land warrant. Their prospective value as a homestead was in the lake-front, and the accretions upon that front. The evidence shows that Anthony exercised dominion as far as he could over all the lands in controversy, selling timber off the island then surrounded by the lake. (Record p. 17, bottom; 19, 24, top, 29, 31.) Plaintiff bought the land in 1890, relying upon the riparian rights and occupying the whole half section so far as it admitted of occupancy up to the time of the re-survey. (See his testimony, Record pp. 32 to 34.) Then a speculative venture was organized by which one-half of the land was to be given for services in procuring the new government title against Schlosser, and the other half was to go to the County so far as swamp lands were concerned.

That a meritorious farmer and settler, succeeding a homestead settler, should be plundered of his landed estate in the manner sought in this suit seems incredible, and we are far from believing that this Court will sanction such enterprises. In the interest of peace and certainty in the land titles of Iowa such suits ought not to succeed.

The cases of French-Glenn &c. Co. vs. Springer, 185 U. S., 47, and Security Land &c. Co. vs. Burns, 193 U. S., 167, are distinguished by the facts from the case at bar.

In the French-Glenn Co. case there was *no lake* opposite the land with reference to which riparian rights were claimed.

In the Security Land Company case there was no survey, in fact, made. The trial court found that the pretended survey was fictitions and fraudulent. This Court said:

"The non-existence of a lake anywhere near the spot indicated on the plat is a strong reason for regarding the so-called meander line as one of boundary instead of a true meander line, and when the plat itself is the result of a gross fraud, and indeed is entirely founded upon it, the reason for refusing to recognize the lake as a boundary becomes apparent."

193 U. S., 182.

Still, even in that case this Court said:

"That this was a fraudulent survey can not be denied. *Still, the government is concluded by such survey, so far as the lands actually described, granted, and paid for are concerned,* but it will not be concluded in regard to other lands, which were not within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, when such lake or body of water is in fact and always has been more than half a mile away from such lots, and where the patentee has received all the land that he actually paid for."

Ib. p. 187.

So, in Niles vs. Cedar Point Club, 175 U. S., 300, the field notes showed that the land meandered out was "flag-marsh; impassable marsh and water." It was held that this was not a meander of a body of water, and that the meander line was a boundary line. This Court said:

"Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line in to the territory north."

Ib. 308.

And so in Hahn vs. Smith, 159 U. S., 41, the meander line was along a bayou designated as the Indian river; the patentee took the land between the meandered land and edge of the bayou, but he claimed land across the bayou, and between that and the true Indian river, in other sections. The land thus claimed amounted to six hundred acres. This Court held that he was concluded by the survey designating the bayou as Indian River,and could not extend his riparian rights to the river itself.

None of these decisions warrant the action of the Court below in the case at bar.

VII.

THE SWAMP LAND GRANT.

1. Hemphill claims three lots under the swamp land grant of 1850. While the suryeyor in 1857 treated these lots as part of Mud Lake, a claim might have been made for them under the swamp grant if they had been selected in apt time.

Prima facie they were lake, and passed under the Anthony patent which gave title to the center of the lake; or as accretions to the meandered lots if it should be held that the patent gave title only to the edge of the lake.

If a patent expressly describing these lots, or the south half of section 30, had been issued by the government to Anthony, it can not be doubted that this would have been an adjudication on its part that such lands were not swamp and did not pass under the swamp land grant of 1850.

Rogers &c. Co., vs. Am. Emigrant Co., 164 U. S., 559.
McCormick vs. Hayes, 159 U. S., 347.
Chandler vs. Calumet Co., 149 U. S., 89.

Young vs. Charnquist, 114 Ia., 116.

But whatever Anthony's patent took by its legal effect was as much within it and covered by it as though specially described therein. The plats and field notes were in effect a part of the patent. They showed that the lands in front of the meandered line were lake, and not swamp. Thus, on the west line of section 30, they showed meander posts on "south side of *lake*;" and on north bank of "lake." (Record p. 57.) On the east line of the section the notes of meander line on section 29 show 40 rods north from the south line of that section, "intersect *lake* and marsh bearing north and south. *Set a quarter section post in mound pit east 8 links and east of true quarter corner, 10 chains and thirty links.*" (Record p. 56.) At the east point of plaintiff's lot 2, on the section line between sections 30 and 31, the field notes read: "Lake marsh. Set a meander post in mound of turf." (Record p. 121.) And the field notes and plats show an outlet between Lost Island Lake and Mud Lake at the southeast corner of section 30. The plats and field notes, therefore, not only showed that plaintiff's lots bordered on a lake, but showed that this lake was one of a series of lakes—Lost Island Lake, Mud Lake, Trumbull Lake, all connected together. As to this the Secretary of the Interior thus describes the situation:

"From the official plat of said township it appears that the lake extends into four townships, viz.: townships 96 and 97, range 34 and 35, is about five and a half miles long, and from a half mile to a mile and a half in width." (Record p. 75.)

This accurately describes the situation shown by the original survey and plats, if we start at Lost Island Lake in township 96, range 34, go north into Mud Lake in tonship 97, range 34, and thence west into Trumbull Lake in township 97, range 35. This was originally "the lake" referred to by the Secretary, but as the country settled up portions of "the lake" on the government plats were given the respective names (Lost Island, Mud and Trumbull) above mentioned. When the original plats and survey were approved they showed plaintiff's lots to be part of a tongue of land projecting into "the lake." (See Exhibits E and F, Record p. 11.) When the Land Department issued Anthony a patent for these lots it undeniablv conveyed lots which that Depatrment declared—(it being "according to the official plat of the survey of said land")—to be on and upon "the lake," with a front of more than a mile thereon according to the calls for distances shown by the meander line. This was an assertion by the Department that this frontage was lake and not swamp land, and was necessarily an adjudication against the present swamp land claim. The legal effect of the patent under the common law rule, as declared by this court, was to carry title to the center of that portion of "the lake"

upon which the lots fronted. This rule prevails in the absence of a different rule by the state courts. Hence the patent under which the plaintiff claims, *prima facie*, at least carries title to the south half of section 30, as claimed by him. Can this title be upset by the swamp land grant forty years after the original survey, and thirty years after Anthony entered the land as a homestead?

Proceeding upon the theory that lots 11, 14, and 15, of the Barber survey might have been claimed in apt time under the swamp grant, which claim would then have been for decision by the land department, we think this question must still be answered in the negative.

It has already been pointed out that section 30 was fully surveyed in 1857 and the corners of the section established and marked. The half section corners were also established and marked on the south and east sides of the section. Any surveyor could have taken the plat and field notes of that survey and sub-divided the section into quarter sections, forties and fractional forties.

In the Government surveys this work is never done in the field. Explaining the method of the Government sub-division of sections the Commissioner of the General Land Office in his report for the year 1870, at page 30, said:

"The sections are subdivided into quarters, containing 160 acres; and, finally, the quarters are still further subdivided into quarter-quarters, embracing forty acres. The sectional divisions into quarter sections and quarter-quarter sections are not actually run and marked in the field; the subdivision of the section of 640 acres into quarter sections is designated by appropriate marks on the half-mile posts established in the field on section lines; while the quarter-quarter sections, or 40-acre tracts, are not so designated in the field, but are indicated by the surveyor general on township plats of the survey by there marking in red ink the surveyed section lines, in order to obtain the quantity of legal subdivisions exhibited on the plats of survey, which are protracted on the scale of two inches to the mile. The public lands are sold by the foregoing subdivisions, and the boundaries of the smallest subdivisions, to-wit: into quarter and into quarter-quarter sections, or 160 and 40 acre tracts, not actually surveyed in the field, can be run and marked on the face of the earth for the purchasers or owners thereof by any surveyor, in accordance with the principles laid down by the act of Congress approved February 11, 1805."

The State and the County might therefore at any time after 1857 have selected as swamp land the land in controversy in lots 11, 14 and 15 of the re-survey of 1898. It was not a case of unsurveyed land. And by the original survey the Government was bound.

U. S. vs. Vallejo, 1 Wall., 660.
Live Stock Co. vs. Springer, 185 U. S., 51, 52, and 54.
Russell vs. Maxwell, 158 U. S., 253.
Smelting Co. vs. Kemp, 104 U. S., 651.

We emphatically deny the power or jurisdiction of the Land Department to make a re-survey of the section under these circumstances, as against rights acquired under the original survey.

Cragin vs. Powell, 128 U. S., 691.

And, as we understand, the Department itself so decided as to this very survey.

2. At any rate, the State and County made their selections of swamp lands and included no part of section 30 therein.

This was done under the instructions issued by the Commissioner of the General Land Office on November 21, 1850, allowing the states to make their own selections, if they so desired, rather than to accept the official surveys, plats and field notes. The method pursued by the State of Iowa under its own statutes is thus stated by this court in

Buena Vista County vs. Ry. Co., 112 U. S., 169.

"The State of Iowa adopted the alternative of making its own designations of lands, claimed by it as corresponding to the description of the grant, and passed, at different times, laws directing by whom they should be made. A statute of 1853 required a full and complete return of the examination and survey of the swamp and overflowed lands, when completed by the county surveyor or other person appointed for that purpose, to be forwarded to the Secretary of State, whose duty it was to report the same to the Surveyor-General.

A subsequent statute, passed January 25, 1855, authorized the Governor to adopt such measures as to him might seem expedient to provide for the selection of the swamp lands of the State, and to secure the title thereto. The Governor accordingly issued circulars, one in 1855 and one in 1858, to the county judge of the several counties, requesting the selection to be made in his county by the county surveyor or other agent, the lists thereof to be forwarded to the Surveyor-General or to the Secretary of the State of Iowa, to be by him forwarded to the proper department for recognition and approval. The act of January 13, 1853, was carried into the Revised Statutes of the State of 1860, as follows:

'Section 927. In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall, at the regular term thereof, after the taking effect of this act, appoint some com-

petent person, who shall, as soon as may be thereafter, after having been duly sworn for that purpose, proceeded to examine said lands and make due reports and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made marked on said plats, to the county courts respectively, which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties, in order to procure recognition of the same on the part of the United States, which lists, after an acknowledgment of the same by the general government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court.'"

By act of the General Assembly of Iowa approved January 25, 1855, it was provided:

"That for the purpose of preserving a proper record of all lands belonging to the state, and of their final disposition, and of transacting business in relation thereto, there shall be a state land office established at the seat of government, with a register thereof, who shall be elected by the peolpe on the first Monday in April next, and shall hold his office for two years, and until his successor is elected and qualified."

See Revision of 1860, page 18.

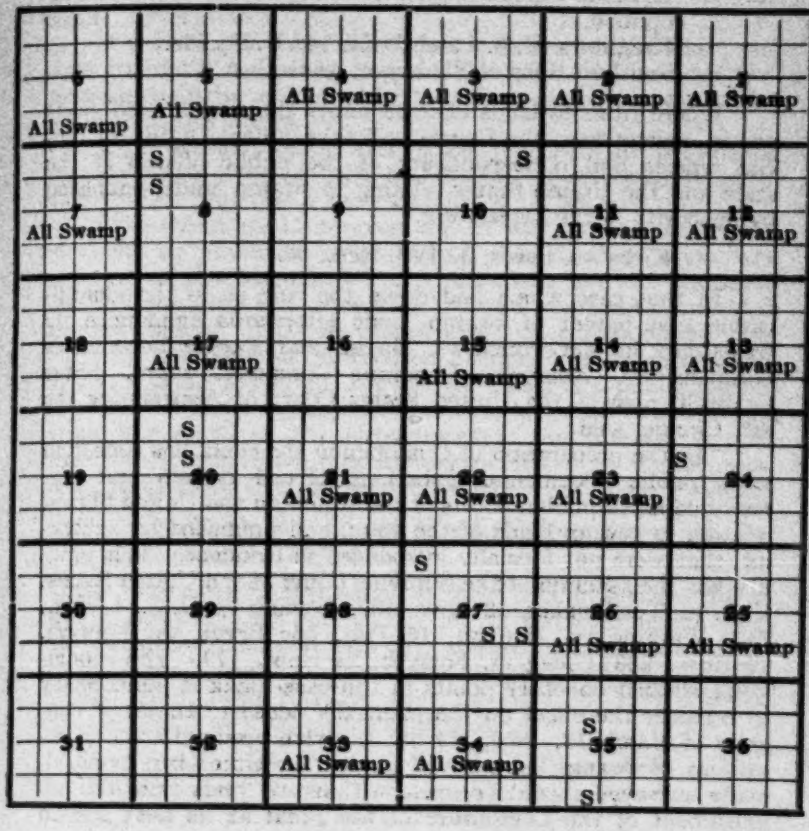
The Code of Iowa of 1873 provided:

"Section 83. The register of the state land office shall keep his office at the seat of government. The books and records of such office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest sub-division of land; to preserve a permanent record in books suitably indexed of all correspondence with any of the departments of the general government in relation to state lands; to preserve by proper records copies of the original lists furnished by the selecting agents of the state, and of all other papers in relation to such lands which are of permanent interest."

The report of the register of the State Land Office for Iowa for the year 1875 shows the lands selected on behalf of Palo Alto County as swamp lands under the swamp land grant. On page 212 of that report there appears the list of lands selected as swamp in the very township in which the land in controversy is situated. 20 full sections in that township were selected and claimed as swamp. In addition to that 11 40-acre tracts were selected. This was considerably more than one-half of the whole township, and would seem to have been a very liberal and amply sufficient selection of swamp lands. No lands in sections 19, 29 or 30 were selected or claimed. One mile away, on the north, the whole of section 17 was selected. A mile on the southeast the whole of section 33 is in the list. Adjoining that, the whole of section 34 was claimed.

Two miles away, on the east, a portion of section 27. Adjoining that, in solid mass, the whole of sections 21, 22, 23, 25 and 26. In section 20, which corners on section 30, a selection of 80 acres claimed as swamp was made.

The entire swamp selections in the township as thus reported are shown on the plat below



These selections forbid any possibility of an idea that Palo Alto County was not hunting vigorously for lands to which any claim under the swamp land grant might justly be made. They exclude all lands on section 30 and show conclusively that the County did not at that day regard any portion of section 30 as swamp land. The records of the United States Land Office at Washington show the same selections, and the courts will take judicial notice of these public reports and archives.

Heath vs. Wallace, 138 U. S., 583-4.
Jones vs. U. S., 137 U. S., 216.
Caha vs. U. S., 152 U. S., 222-3, and cases there cited.
Romero vs. U. S., 1 Wall., 742.
U. S. vs. Teschmaker, 22 How., 405.
Fremont vs. U. S., 17 How., 557.
U. S. vs. Freight Assn., 166 U. S., 364. (Dissenting opinion.)
Knight vs. U. S. Land Ass'n, 142 U. S., 169.
Smith vs. City of Shakopee, 44 C. C. A. 1.

Where titles to lands claimed under the swamp land grant are in controversy, the Courts will take judicial notice of official reports and correspondence of the public officers of the state and the United States relating to swamp lands, published by authority of the Legislature.

Kirby vs. Lewis, 39 Fed. Rep., 66.

In that case which laid down the rule as to the identification and patent of swamp lands afterwards announced by this Court in McCormick vs. Hayes, and Rogers Locomotive Company vs. American Emigrant Company, *supra*, Judge Caldwell, now of the United States Court of Appeals for the 8th Circuit, said:

"In the preparation of this opinion the court has consulted some public documents, embracing official reports and correspondence of public officers of the state and the United States, relating to swamp lands of the state, and published by authority, that were not formally introduced in evidence. This practice has the sanction of the Supreme Court of the United States. U. S. vs. Teschmaker, 22 How., 405; Romero vs. U. S., 1 Wall., 742; Watkins vs. Holman, 16 Pet., 56; Bryan vs. Forsyth, 19 How., 338; Gregg vs. Forsyth, 24 How., 179. The conclusions reached on other points in the case make it unnecessary to consider the effect on the plaintiff's deed of the act of congress of March 12, 1860, (12 St. 3) which required that all selections of swamp lands to be made thereafter from lands already surveyed should be made within two years from the adjournment of the Legislature of the State at its next session after the date of the act."

In

Knight vs. Land Assn., 142 U. S., 168-9.

it is said in the statement of the case:

"To understand precisely the exact nature of the question involved in this case a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings, and are recited in former decisions of this court,

statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice."

And this court, both in the opinion of the court by Mr. Justice Lamar, and the concurring opinion by Mr. Justice Field, seems to have taken judicial notice of the records, decisions and opinions of the Land Office and Department of the Interior.

In a California case, the Supreme Court of that State noticed judicially the proceedings of the Land and Interior Departments relative to the real estate there in controversy. The bill in that case averred:

"Said sections have ever since remained so withdrawn by virtue and force of such withdrawal"; but the court, after showing that this was a mere conclusion of law said:

"The withdrawal, however, was in fact revoked on August 15, 1887, by executive order after a rule to show cause was served upon the Atlantic & Pacific Company and the Southern Pacific Company, and after each of said companies had filed answers thereto. For the proceedings and action of the Secretary of the Interior in relation thereto, see Atlantic & P. R. Co., 6 Land Dec. Dep. Int., 77-93. This is a public record, of which the court takes judicial notice, and such action, being within the power of the Department of the Interior, is conclusive, and might be properly considered even if the complaint had alleged that the withdrawal had not been revoked."

So. Pacific Ry. Co. vs. Wood, 57 Pac. Rep., 392.
Same Case, 124 Calif., 484.

3. The attempted selection of these lots in section 30 as swamp lands in 1898 was clearly an afterthought based upon the speculative venture with Mr. Evans, already referred to. He had been Register of the United States Land Office at Des Moines, Iowa, from May 29, 1894, to June 30, 1897. And of this the courts will take judicial notice.

York & C. R. I. Co. vs. Winans, 17 How., 686.
Riland vs. Brown, 75 Iowa, 679.
Keyser vs. Hitz, 133 U. S., 138.

The state courts will take judicial notice of United States officers within their respective States, including Receivers of United States Land Offices.

Bullock vs. Wilson, (Ala.) 5 Port., 338.
Herriot vs. Broussard, (La.) 4 Mart. (N. S.), 260.
Barton vs. Hempkin, 19 La., 510.
Lerch vs. Snyder, 112 Pa. St., 161.

It may fairly be presumed that he there acquired knowledge both of the facts and of the law and practice of the Land

Department, which set this speculative venture on foot. The case as to this feature seems to be peculiarly within the mischiefs pointed out by this Court in

Mitchell vs. Smale, 140 U. S., 412.

"Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

As to Mr. Evans' part in the transaction it would seem to be within the condemnation visited by this court upon somewhat similar transactions in

Cragin vs. Powell, 128 U. S., 700.
Taylor vs. Brown, 5 Cranch, 256.

His grantee, Hemphill, claiming under a quit claim deed from him, apparently with full knowledge of the facts, for he introduced the contract of Mr. Evans in evidence, and also claiming under a mere executory contract with the county of Palo Alto, is in no better situation than Mr. Evans himself would be if a party to this litigation. As shown by the cases last above cited, such a belated and speculative claim to real estate is not looked upon with favor by a court of equity.

4. The situation of Palo Alto County, the immediate beneficiary of the swamp land grant, under direct legislative grant from the State of Iowa, is not different from that of the County in the cases of

McCormick vs. Hayes, 159 U. S., 347-8.
Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

The delay and *laches* of the County in asserting any claim to the lands under the swamp land grant, its action in selecting other lands in the same township as swamp lands and in excluding the lands claimed by the plaintiff from such selections, the great lapse of time during which the title of Anthony, the original patentee, and the plaintiff here, his successor in interest, remained unquestioned; the new rights which have grown up under the Anthony patent and possession thereunder, are amply sufficient to estop the County and its grantees, who are in no better situation than it, from asserting the speculative claim of title which the record in the case disclosed.

In the case of Kirby vs. Lewis, *supra*, the laws of Arkansas relative to swamp selections were practically the same as those of the state of Iowa; and in a case where the facts were substantially similar to the case at bar Judge Caldwell said:

"The agent who made the selections resided in the county, and was charged with the duty of selecting all the swamp lands in it. His official duty, as well as the fees he received for his services, would impel him to include in his selections all lands coming within the purview of the grant, and it is highly probable that he did so. It is a maxim of the law that a public officer is presumed to have fulfilled every requisite which the discharge of his duty demands (Russell vs. Beebe, Hemp., 704), and this maxim is applicable to the state agent, *and it will be presumed that he selected and reported all the swamp lands in the county in accordance with his official duty; and after the lapse of 30 years, and on the facts of this case, this presumption would seem to be conclusive.* U. S. vs. Beebe, 127 U. S., 338, 8 Sup. Ct. Rep., 1083; 9 Ops. Atty. Gen. 204."

The same presumption must arise in the case at bar.

Furthermore, this delay is directly in the teeth of the Act of Congress of March 12, 1860, which reads as follows:

"An Act to extend the Provisions of 'An Act to enable the State of Arkansas and other States to reclaim the Swamp Lands within their Limits' to Minnesota and Oregon, and for other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act of Congress entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' approved September twenty-eight, eighteen hundred and fifty, be, and the same are hereby, extended to the States of Minnesota and Oregon; Provided, that the grant hereby made shall not include any lands which the Government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of the said act.

"Sec. 2. And be it further enacted, That the selection to be made from lands already surveyed in each of the States including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the State of Louisiana in draining the swamp lands therein, approved March second, one thousand eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the Governor of the State, that the surveys have been completed and confirmed.

"APPROVED, March 12, 1860."

12 U. S. Stats. at Large, 3.

This statute has never been amended or repealed. We

submit that it is an effective statute of limitations both at law and in equity completely barring the swamp land claim set up by Hemphill.

It is now fully settled that title under the swamp land grant does not pass until swamp land selections have been presented to the Land Department of the General Government, and that Department has acted favorably upon such selections, and thereon has issued patents.

This being so, we perceive no reason why it was not entirely competent for Congress in the interest of peace in land titles, and to avoid confusion therein and the consequent public mischiefs, to fix a time within which claims under the swamp land grant should be presented to the tribunal designated by that grant, for final determination. By the act in question Congress fixed that limit. This court seems to accept that view and the decisions of the Commissioner of the General Land Office and Secretary of the Interior enforcing it, in

Buena Vista Co. vs. R. R. Co., 112 U. S., 174.

And see Fussell v Gregg 113 U.S. 550 561-4-5

The next Legislature of Iowa after the passage of this Act adjourned April 9th, 1864. This gave until April 9, 1866, to make swamp selections in Iowa. We have seen that section 30 was surveyed in 1857. No reason is shown for postponing swamp selections in that section later than the date fixed by this Act. And there is no reason why the prescribed bar should not be enforced.

The plaintiff, by his reply, set up that the resurvey and proceedings thereunder were without authority or jurisdiction for the reason that prior thereto the United States had caused section 30 to be surveyed and platted, and thereafter sold and conveyed the land according to the official plat to John A. Anthony; and thus, by said patent, the United States parted with all its title to all the land in controversy herein. (Record 7, Division II of Reply, and Record p. 9.)

He also by reply pleaded in bar the adverse possession of plaintiff and those under whom he claimed for more than ten years prior to the commencement of the suit, and that defendants were barred by the statute of limitations. (Record p. 10.)

The court below held that the statute of limitations did not apply because the title to the land remained in the United States until 1898. If, however, the title passed under the Anthony patent, as we have attempted to demonstrate, then the decision of the court below was wrong *because of the legal effect of that patent*, and very evidently that decision is a federal question which may be reviewed here. The court below did not pass upon the federal statute of limitations of March 12, 1860, above set forth, and that statute is within the pleadings and for the determination of this court in so far as it affects

the claim of defendant Hemphill under the swamp land grant.

We have seen that under the circumstances of the case the lines run by the Government Surveyor in 1857 are conclusive. On the question of the effect of such lines in a swamp land case it was said in a concurring opinion by Mr. Justice Field:

"The approved survey upon which the patent was issued crossed the mouth of Mission Creek and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiffs could collaterally assail the correctness of the official survey upon which the patent was issued and establish another line as the true boundary, and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any court. If there was error in the survey embodied in the patent it could not have been shown in this action. It could only have been corrected by direct proceedings for that purpose instituted by the government or by its authority. This is elementary law, and in vain will authorities be sought to contradict this view."

Knight vs. Land Assn., 142 U. S., 205-6.

"The ascertainment of the true line of the boundaries of the claim confirmed was a matter especially entrusted to that department by the laws of Congress, as already stated. If the officers of that department in executing the survey made mistakes, ran erroneous lines and included lands which they should have excluded, those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void. If all that is asserted be true, they only erred in the exercise of their jurisdiction, and the remedy for their errors before the issue of the patent lay in an appeal to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the Secretary of the Interior; and if after the issue of the patent like objections were urged, the remedy could be sought only by direct proceedings."

Ib., 211-212.

Obviously the court below could not deprive plaintiff of his land under the Anthony patent, the government survey, plats and field notes, upon collateral attacks and suppositious issues raised by itself in the first instance.

Furthermore, the plats and field notes when duly approved had the force of a deposition as to the facts relating to the survey thus written out and depicted.

"Plats and certificates because of the official character

of the surveyor general have accorded to them the force and character of a deposition; the same as in Arguilar's certificate to a copy of the grant, as we held in the case of Wiggins, 14 Peters, 346."

U. S. vs. Hanson, 16 Peters, 201 bottom, 202 top.

"The official return of the surveyor general has accorded to it the force of a deposition. So we held in the case of Breward and Hanson ,to which we refer."

U. S. vs. Lowe, 16 Peters, 166.

To the same effect,

U. S. vs. Boirdore, 11 How., 553 bottom.
U. S. vs. Breward, 16 Peters, 143.

Thus, in the case at bar, it conclusively appears from the survey, field notes and plats, that at the time of the survey Mud Lake and Lost Island Lake opened into each other at the southeast corner of section 30, and that section 30 itself was then lake to the extent depicted by plats and field notes, opening in turn into Trumbull lake at a considerable distance westward.

Thus a very considerable lake region undeniably existed at the time the survey was made in 1855 and 1857. A large area was covered by a continuous and apparently permanent sheet of water upon which the land in controversy fronted. The survey can not be summarily set aside as "not proper" or for errors, upon conjectures raised by a court forty years later.

That court itself has decided that the sole test as to alleged swamp land is "What was its character on the 28th of Sept., 1850"; and that the character of the land at that time of trial was not admissible in evidence.

Connors vs. Meservey, 76 Iowa, 695.

5. In any case, courts of equity act in analogy to statutes of limitations. This is familiar and elementary doctrine. Trusts are not always included in the rule, but there is no question of trust in the case at bar.

The *laches* of the State and Palo Alto county in asserting any title or claim under the swamp land grant was continuous for thirty years, or three times the Iowa statutory period, after the inception of the title under Anthony's homestead entry; it was fifteen times the period of the bar prescribed by the act of Congress after Anthony's homestead entry, and sixteen times the period of that bar after the swamp land claim was required to be asserted in 1866. Such *laches* in view of the adverse possession under the Anthony title ought to conclude defendant Hemphill as to his claim under the swamp land

grant, and under the peculiar circumstances of this case and the speculative character of his claim, it seems to be a peculiarly appropriate case for application of the equitable rule.

The doctrine was long ago laid down by this court and has been continuously maintained up to the present time, that

"A court of equity, *which is never active in relief against conscience, or public convenience,* has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity, *but conscience, good faith,* and reasonable diligence. When these are wanting, the court is passive, but does nothing; *laches* and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court."

Piatt vs. Vattier, 9 Pet., 416-417.

And it was held in that case that adverse possession was a sufficient defense as against the long continued *laches* of the plaintiff.

In the case at bar we do not think the court can either find "conscience, good faith or reasonable diligence." And in Iowa laches in claiming the legal title under a public grant has been held a bar to the assertion of such legal title when obtained, in a case where indemnity land was earned under a railroad grant. The railroad was completed in 1869. Nine years later the land was selected as indemnity for land which had been sold within the six-mile limit of the grant. A patent was issued under the railroad grant in 1893. The County of Webster claimed under the swamp land grant and sold the land in 1860. But it was never patented to the State or the County under the swamp grant. The land had been taken possession of under the supposed title from Webster County and improved in 1887. It was held that there had been such laches in securing title under the railroad grant and in asserting the title, that the plaintiff could not maintain the suit against one in possession under the swamp land grant.

Young vs. Snell, 115 Ia., 32.

The same rule was applied under the same circumstances and with reference to the same railroad grant in,

Young vs. Hansen, 95 Iowa, 721.
Bourne vs. Ragan, 96 Iowa, 572.

In the last case it was said:

"The laches of the railroad company are such that every equitable consideration demands that it and its employés should be estopped from now questioning the plaintiff's title. It is

quite apparent that the innocent purchasers of these lands should be protected in their homes from such attacks as are made upon them in this case, and in the case of Young vs. Hansen, above cited." And the same rule has been declared by the court below as to laches in asserting title under the swamp grant.

"This plaintiff and his grantor have for about thirty years in good faith, under a patent title from the government, been the ostensible owners of this land to which he now seeks to have the title quieted. The only claim against such a right is a doubtful fact as to the actual character of the land as to being swampy. We are led to believe that, up to a recent date, no one has openly treated the land as of that character, but, on the contrary, with knowledge that it was claimed, under an entry from the government, as not such land, the grantors of the defendant have acquiesced in the ownership of the plaintiff for such a length of time that neither they nor their grantee should be permitted to dispute it."

Knapp vs. Paine, 95 Iowa, 67-8.

See also

Miller vs. McIntyre, 6 Pet., 62.

Where it was sought after thirty years to establish a trust to land entered with a land warrant which in fact belonged to plaintiff's ancestor, this court after referring to the great increase in the value of the property said:

"The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance or want of means, it is by no means illimitable."

And the suit was held to be barred by laches.

Wetzel vs. Minn. Ry. Co., 169 U. S., 241.

And again,

"No rule of law is better settled than that a court of equity will not aid a party whose application *is destitute of conscience, good faith, and reasonable diligence*, but will discourage stale demands for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiesence in the assertion of adverse rights has occurred."

Hammond vs. Hopkins, 142 U. S., 250.

Applying these cases, we insist that upon no possible ground should the claim of Hemphill under the swamp grant be sustained in the case at bar.

And these matters are for consideration and determination by this court.

Applying precisely similar matters to a claim under the swamp land grant as against a patent from the United States, this Court said:

"As the court below did not proceed upon the grounds we have stated to be proper, and as its judgment deprived the defendant of rights secured by the laws and exercised under the authority of the United States, that judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion."

McCormick vs. Hayes, 159 U. S., 348.

And to the same effect is

Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

So here, as the court below failed to give proper effect to the patent under which plaintiff claims, and its action should be reversed.

VIII.

JURISDICTION.

1. The Anthony patent under which plaintiff in error claims having been based upon and with reference to a sufficient survey of section 30, actually made and approved by the Interior department, and the lots thereby conveyed fronting upon an actual lake then existing and now existing, the title claimed by plaintiff was thereby fixed and determined so far as the land department was concerned. That department was absolutely without power or jurisdiction to act further in the matter by new survey.

Davis vs. Wiebbold, 139 U. S., 507.
Hardin vs. Jordan, 140 U. S., 401.
Moore vs. Robins, 96 U. S., 534.
Cragin vs. Powell, 128 U. S., 698.
Mitchell vs. Smale, 140 U. S., 406.
Kean vs. Calumet Canal Co., 193 U. S., 453.
Grand Rapids &c. vs. Butler, 155 U. S., 95.
Ry. Co. vs. Schurmeir, 7 Wall., 289.
Cited in "VI, Points of Law and Facts," page 24, *supra*.

And distinctly holding this rule are the cases of

Noble vs. Union River Logging Ry., 147 U. S., 175-6.
U. S. vs. Schurz, 102 U. S., 402.
Moore vs. Robins, 96 U. S., 530.

2. It results that patents or incipient titles under the

swamp and homestead acts, based upon such void action of the land department, are themselves equally void. In sustaining such subsequent patents and incipient titles the court below denied the legal effect of the Anthony patent as claimed by plaintiff, and denies his express claim of title thereunder. Whether such decision was rightful or erroneous it is reviewable by this court.

3. We have already seen that the court below did not found its decision upon any finding of fact which ousts the jurisdiction of this court. Its holding that Mud Lake was not "proper" or "necessary" to be meandered, is not a finding of fact but a conclusion of law. It is nothing less than the assertion of the legal power to review the discretion vested in the government surveyor and land department, and thereupon to hold that such discretion was not properly or correctly exercised. It was not a case where there was no lake, or no survey in fact, or a grossly fraudulent survey. It is obvious and undisputed from the plats and field notes that the government surveyor made an actual survey and an honest meander of the lake as it then existed. The court below does not deny this or hint at any fraud. It simply concludes, in legal effect, that in view of what is known to or conjectured by it forty years later, if it had been the surveyor it would not have meandered the lake. This is a denial of the legal effect of the patent under which plaintiff claims, upon a legal conclusion by the court below,—a legal conclusion which we submit was erroneous, and which the court was without jurisdiction to assert as against an ancient survey and patent—for muniments of title which are thirty years old are deemed ancient at the common law.

1 Greenleaf on Ev., 15th Ed., Section 21.

The legal conclusion of the court below that the meander line was not correctly run is open to the same objections and is reviewable in this tribunal. It has been pointed out, with full citation of authorities, *supra*, that this line under the circumstances of the case is absolutely conclusive, and that no court has jurisdiction to set it aside or disregard it.

4. To sustain the swamp land patents under the unauthorized and void survey, and under the undisputed facts of the case, already pointed out and discussed, was an erroneous denial of plaintiff's title under the Anthony patent, and of the legal effect of that patent, which is reviewable here.

By legal implication, in denying plaintiff's title to the land between the meander line and the lake, the court below sustained the claim of defendant Ryan under his homestead entry, based upon the same void and unauthorized survey, although that learned tribunal appears to have been totally unconscious of the fact that a homestead entry was before it

for determination as against the legal effect of plaintiff's title under the Anthony patent. That action of the court below is clearly reviewable here.

The prior decisions of this court sustain this view as to all of the foregoing matters.

So far as asserting the swamp land grant against the patent under which plaintiff claims is concerned, the jurisdiction of this court is undeniably sustained by two of its decisions already cited which are directly in point.

McCormick vs. Hayes, 149 U. S., 347.
Rogers Locomotive Works vs. Emigrant Co., 164 U. S., 573.

5. In some of the cases decided by this court which are in point in the case at bar, the question of jurisdiction has not been discussed by the court or passed upon in express terms.

But, as was said in recent cases,

"The rule is well established that, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes.' M. C. & L. M. Railway Co. vs. Swan, 111 U. S., 379, 382; King Bridge Co. vs. Otoe County, 120 U. S., 225; Martin vs. Balt. & Ohio R. R. Co., 151 U. S., 673, 690; Powers vs. Chesapeake & Ohio Railway, 169 U. S., 92, 98; Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S., 449, 453."

Continental Natl. Bank vs. Buford, 191 U. S., 120.

"The fundamental question of jurisdiction, first, of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not. Mansfield, Coldwater &c. Railway vs. Swan, 111 U. S., 379, 382; Metcalf vs. Watertown, 128 U. S., 586; Morris vs. Gilmar, 129 U. S., 315; Continental National Bank vs. Buford, ante, 119."

Warner vs. Searle & Hereth Co., 191 U. S., 194.

In a case where the legal effect of the patent of plaintiff in error touching riparian ownership as claimed by him was denied by the state court, and denied by this court, jurisdiction to pass upon the questions involved was none the less sustained. It was said:

"Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain, 8 Stat., 252, and a patent of the United States dated December 28, 1836, in alleged confirmation of

such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of the opinion that they can not be so considered, and the motion to dismiss must therefore be denied."

Mobile Trans. Co. vs. Mobile, 187 U. S., 482.

And sustaining the jurisdiction of the court against a motion to dismiss where it appeared, not from the pleadings but from the opinion of the court below, that plaintiff claimed rights in real estate under an act of Congress, and his claim was denied, is the case of

Land & Water Co. vs. San Jose Ranch Co., 189 U. S., 179.

In a late case the plaintiff in error claimed as a riparian owner under patents from the United States, and under the legal effect of such patents. His claims were rejected by the Supreme Court of Illinois. On error to that court it was urged by the defendant in error against the jurisdiction of this court (190 U. S., 517):

"The decision of the Illinois Supreme Court complained of involved a question of local law purely, upon which its judgment was final. The pivotal question in this case is that the local law of the State in which lands patented by the United States lie, governs the construction to be given to grants of lands bordering upon waters, whether navigable lake, navigable stream, or non-navigable lake or stream." (Citing authorities.) (Page 519.)

This was in accordance with the dissenting opinion of Mr. Justice White in the case of

Kean vs. Calumet Co., 190 U. S., 474-5.

This court, however, maintained its jurisdiction, saying upon this point:

"The decree having been affirmed by the Supreme Court of the State, 177 Illinois, 123 S. C., 161 Illinois, 462, the case is brought here by writ of error. Mitchell vs. Smale, 140 U. S., 406, 410; Shively vs. Bowlby, 152 U. S., 1, 9, 10."

Hardin vs. Shedd, 190 U. S., 518.

These cases of Mitchell vs. Smale and Shively vs. Bowlby are decisions sustaining the jurisdiction of this court on like writs of error. Undeniably then the Court decided in express terms that it had jurisdiction in the Hardin-Shedd case.

So in the above cited case of Kean vs. Calumet Company, Mr. Justice White having raised the question of jurisdiction in his dissenting opinion, it is quite obvious not only that this

court under the general rule above quoted passed upon its jurisdiction, but that it must have expressly considered that question in deciding against the point made in the dissenting opinion.

Both of these decisions are in point in the case at bar.

In Mitchell vs. Smale, 140 U. S., 407-410, the same questions were involved and were decided with reference to the law of the State of Illinois as to riparian ownership upon a non-navigable lake. It was expressly decided by this court that Smale's claim as to the legal effect of his patent gave the United States Circuit Court jurisdiction, and the jurisdiction of this court was maintained on error. It was there said of the petition for removal, opinion by Mr. Justice Bradley:

"It states very clearly that the controversy between the parties involved the authority of the Land Department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute, after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party under the authority of the government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true, the laws of the State of Illinois might be invoked by one party or both; but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are, therefore, of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and is within the purview of the act of 1875."

Ib. p. 410.

This decision is in point in the case at bar.

So in Hardin vs. Jordan, 140 U. S., 371, where the same questions were involved as in Mitchell vs. Smale, and where the two cases were both decided on the same day,—both opinions being by Mr. Justice Bradley,—it is obvious that this court passed upon the same jurisdictional question both as to this court and the court below.

See also authorities cited and questions argued in brief for plaintiff in error on motion of defendants in error to dismiss. (pp. 6 to 14.)

That motion has been passed to be submitted with the case, and we take it for granted that the briefs on the motion on both sides will be considered in passing upon the jurisdictional question.

6. Counsel for defendants in error insists, however, that the Supreme Court of Iowa decides the case upon a clear question of fact independent of the Federal questions upon which Schlosser relies. He asserts that the court below "found as

a fact that the so-called Mud Lake was not a lake, never had been a lake and was swamp and overflowed land"; (See his reply brief on motion to dismiss, p. 1.)

Even if that were so the case of

French Glenn Live Stock Co vs. Springer, 185 U. S., 54,

conclusively sustains the jurisdiction of this court. There it was found in the state court that

"If the east and west exterior lines were extended north indefinitely they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof."

This court said, opinion by Mr. Justice Shiras:

"As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

"For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while *if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions*, it was competent for the defendant to show that there was not at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction."

Ib. 54.

It is vain to argue, as is done on behalf of defendants in error that "an examination of this authority discloses the fact that the question of jurisdiction was not raised in that case except as suggested by Mr. Justice Shiras in the opinion."

For, as we have seen, it is elementary that on every writ of error or appeal the first fundamental question here is that of jurisdiction, and it must be determined by the court, whether propounded by counsel or not.

It follows that if the court below had, as claimed, decided as a question of fact that there never was any lake where the government surveyor located what is now Mud Lake, this court would still have jurisdiction on writ of error.

But the Supreme Court of Iowa decided no such thing.

The statement of the matter by the counsel for defendants in error shows this. He says (page 2, of reply brief on motion):

"The question the Supreme Court had to decide was as

stated in their opinion 'whether there was a body of water upon section 30 proper to be meandered. * * We do not intend setting out the testimony on this point. * * From a careful reading of it we reach the conclusion there was no such body of water.'"

That is, "there was no such body of water" *proper to be meandered.* That was a legal conclusion as we have pointed out, and a conclusion which the court below was without jurisdiction to make in view of the Government survey and plats.

Nor did the court below deny the existence of a permanent lake. It simply denied that the permanent portion of the water *was as extensive* as depicted by the government surveyor, and thus attempted to review his discretion, survey and plat upon that ground. It says, "In wet seasons, doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water *of any considerable extent existed there.*"

The very field notes of the new survey, as we have pointed out, show a permanent body of water of very considerable extent on section 30. Was this also subject to review by the court below? It seems idle to us, in view of the authorities, to claim that the court below decided the case on any question of fact, or any independent ground not involving a Federal question. The case falls rather under the decision of this court, cited and quoted from by the learned counsel in his reply brief on the motion, at page 7, as follows:

"When, indeed the question decided by the state court is not merely of the weight and sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon the question of Federal law, the decision may be reviewed by this court."

Dower vs. Rogers, 151 U. S., 658.

The court below held that the legal effect of the evidence—as bearing upon the government survey, field notes and plats,—matters arising under Federal laws, and authority exercised under the United States,—was that the lake was not "proper" or "necessary" to be meandered. This ripped up and abrogated the government survey, field notes and plats which were part of the Anthony patent as much as though incorporated therein; and having thus nullified that portion of the patent, the court below decided against plaintiff's title and right as riparian owner specially set up and claimed by him under the portion of the patent thus nullified. Whether the court below could thus review the discretion of the government surveyor in making a survey in the field, under then existing circumstances, and could review the discretion of the land department in approving the survey, and issuing a patent based thereon, and thereupon deny plaintiff's title as riparian owner,

are questions purely of Federal law and of a title claimed under Federal statutes and authority exercised under the United States. Those questions are clearly reviewable here, where plaintiff's title thus set up is thus denied.

In the above case of Dower vs. Rogers the question was whether a ledge containing gold-bearing rock was known to be valuable for mining purposes at the time a town-site patent was issued. If it was known, it was excluded from the patent; if not so known, title to it passed under the patent. The Supreme Court of California decided the legal question involved under the Federal laws correctly. This court said:

"There can be no doubt that the decision of the Supreme Court of the State in this respect was correct. It is established by the former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them, and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. (Page 663.)

It was found by the trial court in an action of ejectment, as a matter of fact, that at the date of the town-site patent the ledge was not known to be valuable for mining purposes. And on this finding of fact the trial court and the Supreme Court of California gave judgment against the claimant in hostility to the town-site patent.

This court said:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court." (Page 663.)

This must obviously be true in an action at law. None the less the case was not dismissed for want of jurisdiction. On the contrary, the judgment below was affirmed. It was said;

"The case now before us is in an action of ejectment, which was submitted to the Supreme Court of the same State, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the State. From the foregoing reasons and authorities, it follows that this court can not review the decision of the state court *upon the question of fact* whether

the ledge, at the time when the town-site patent took effect, was known to be valuable for mining purposes; and the only question of Federal law in the case having been rightly decided by that court, its judgment is *Affirmed.*" (Page 672.)

It is difficult to understand why this decision should be cited in opposition to jurisdiction in the case at bar

In the case at bar the decision below

"Is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court."

Shively vs. Bowlby, 152 U. S., 10.

7. Under the Iowa practice in equity, on an appeal the case is tried *de novo* by the Supreme Court, and its judgment is final.

Butterfield vs. Wilton Institute, 85 Ia., 404;

"On the trial of an equity case on appeal this court examines the entire record, to determine the decree that should be entered, and the findings of the district court are no limitation upon its course of procedure. It considers the case anew, and directs judgments in accord with its own findings, except that, where one party indicates, by not appealing, that he is satisfied with the judgment, it will not be modified in his favor."

Smith vs. Knight, 88 Iowa, 280.
West vs. West, 90 Iowa, 43.

"Under the constitution, the cause, when before the court, at the former term, was tried *de novo* in this court. This being so, it must ordinarily follow that the successful party, if he asks it, is entitled to a decree in this court. Such has been the practice ever since the adoption of the constitution."

First Natl. Bank vs. Banker, 60 Iowa, 133.

As to the practice of directing a judgment below in suits in equity after trial *de novo* in the Supreme Court that tribunal said.

"As the judgment will affect the title to real estate, it seems to us that the final judgment should be entered in the district court. We, however, recognize the right of either party to a judgment in this court, if such course is deemed best. We will, however, remand the cause to the district court, with directions to enter a judgment in accordance with the opinion."

Hait vs. Ensign et al, 61 Iowa, 727-728.
Fenton vs. Way, 40 Ia. 199 S. C. 44 Ia, 439.

In such cases the writ of error issues to the Supreme Court of the state and not to the inferior tribunal.

Atherton vs. Fowler, 91 U. S., 145.
Mower vs. Fletcher, 114 U. S., 217.

We think this court has jurisdiction of all of the matters argued above, and we submit that the judgment of the Supreme Court of Iowa ought to be reversed.

CHAS. A. CLARK,
GEO. E. CLARKE.
For Plaintiff in Error.

FILE COPY.

Office Supreme Court U.
FILED
FEB 27 1905
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR.

DECISION OF COMMISSIONER OF GENERAL LAND OFFICE, DATED AUGUST 27th, 1894.

GEORGE E. CLARKE, CHAS. A. CLARK,
For Plaintiff in Error.

E
J. H. B.
81948-1894

F. F.
J. V. W.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., August 27, 1894.

ADDRESS ONLY THE
COMMISSIONER OF THE GENERAL LAND OFFICE.

Hon. W. B. Allison,
U. S. Senate.

Sir:

I am in receipt of your letter dated July 31, 1894, transmitting one addressed to you from Mr. J. W. Cory of Spirit Lake, Iowa, of date July 24, 1894, inclosing what purports to be a copy of a decision by the Supreme Court of the State of Iowa, in regard to certain land in section 19, township 97 north, range 34 west, 5th P. M., Iowa, shown upon the official plat in this office, approved June 22, 1858, to be covered by a portion of a meandered lake.

With your letter, official letters "E," dated April 9, and May 3, 1892, addressed to you, were also returned, which were in reply to letters from Mr. Cory, dated March 22 and April 23, 1892, in regard to the survey of certain land embraced within the meandered lines of said lake, locally known as "Palo Alto Lake," in sections 19, 20, 29 and 30 of said township and range.

In his letter to you Mr. Cory states that over two years ago he prepared a plat or rather survey of the land and attached it to an application for the survey thereof and forwarded it to this office; that in the tract of land which is in dispute there are over 1000 acres of high, rolling prairie land, which as shown upon the plat, "made by the Government Surveyor in 1855 or 1857, is marked water and is claimed that this land is a part of Lost Island Lake in Palo Alto County;" that "the Land Commissioner may claim that it is a part of the lake and you can silence his objections by showing him this clause which will settle that question without a doubt," suggesting that if you wish, he will prepare a bill if you will indicate what would be proper and right.

In your letter transmitting the papers it is stated that the land has never been drained or surveyed, and your friend desires to have some legislation which will enable him to purchase the land and wishes you to prepare a bill for that purpose. You therefore request that the matter be examined and information furnished you on the subject, and, if practicable, you request that this office suggest a proper bill, concluding by referring to the fact that you had some correspondence with this office on the same subject some years ago.

The matter referred to in the copy of decision by the Supreme Court of the State of Iowa, decided May 26, 1894, entitled "Grant et al. v. Hemphill et al., submitted by Mr. Cory, appears to have been brought before the court on appeal from decision by the district court of Palo Alto County, and involves "the greater part of what is claimed to be section 19, "township 97, range 34, in Palo Alto County," within the meandered lines of the lake above referred to, and appears to be a part of the land, the survey of which is desired by Mr. Cory. It is stated in said copy of decision by the State Supreme Court that:

"This is a suit in equity, by which the plaintiffs claim title to and possession of certain land, and they demand that said title and possession be quieted as against the defendants. A writ of injunction was invoked and granted, by which the defendants were restrained from taking the possession of the land in dispute. The district court entered a decree dismissing the plaintiffs' petition and they appeal. The Chicago, Milwaukee & St. Paul Railway Company intervened in the action, claiming to be the owner of the land as part of its government land grant, and the petition of intervention was dismissed. The intervener appeals. Affirmed.

Soper, Allen & Morling, for plaintiff appellants. Geo. E. Clark for intervener appellant. J. W. Cory, for appellees."

In reply, I have the honor to state that in 1890, Mr. Cory addressed several letters to this office and was advised in office letter "E" dated October, 30, 1890, that an examination of the official plat of the survey of township 97 north, range 34 west, Iowa, showed, *that the alleged unsurveyed land was embraced within the lines of a meandered lake upon which the public surveys had been duly closed, and that "it is held by this office and heretofore affirmed by the department that there is no law authorizing the survey and disposal of lands embraced within the lines of meandered lakes*; hence no applications to that end will be approved."

Prior to this, namely, on October 11, 1890, the Register of the U. S. Land Office at Des Moines, Iowa, transmitted a plat and field notes of a private survey of said land, executed by J. T. Painter, county surveyor of Clay County, Iowa, saying that the land was perhaps, many years ago, partially under water from the lake, but is now good farming land; that certain persons had applied to that office to enter portions thereof under the Homestead and Timber Culture laws, but that he hesitated about permitting the entries and asked instructions in the matter.

He was advised that this office declined to recognize the survey made by J. T. Painter and that no entries of said land would be permitted. The plat and field notes of Mr. Painter's survey were returned to the Register with official letter "E" dated October 28, 1890. This plat is doubtless the plat referred to in Mr. Cory's letter to you, as being on file in *this*

office, showing the alleged "1000 acres of high, rolling prairie land."

In official letter "E" addressed to you dated April 9, 1892, in reply to one from Mr. Cory dated March 30, 1892, addressed to you, referring to the action of this office in declining to entertain an application for the survey of the land to the end that it might be disposed of as public land of the United States, Mr. Cory asked that an act of Congress be passed authorizing a survey of the land to the end that his clients might have the first right of entry, and you requested this office to send you a form of bill that would cover the case.

In reply, this office in letter "E" dated April 9, 1892, addressed to you referred to the fact that the lake had, according to the official plat, been meandered, and the lots bordering thereon had long since been disposed of by the Government in accordance with the plat, and in view of the decisions by the U. S. Supreme Court, rendered May 11, 1891, in the cases of Hardin vs. Jordan and Mitchell vs. Smale, 140 U. S., 371, 406, the Department holds that the United States has no title to any lands which may exist within the area of such meandered lakes, formed since the original survey of the townships embracing the same, where the lands or lots bordering upon the lakes had been disposed of by the Government in accordance with the official plats; therefore it would appear that if a law was enacted of the character suggested by Mr. Cory it would interfere with vested rights, consequently this office deemed it unadvisable to cause to be prepared the form of bill suggested.

Further information was sought on the subject by Mr. Cory, through you, and in official letter "E" dated May 3, 1892, addressed to you, reference was made to Mr. Cory's letter to this office dated April 25, 1892, in which he alleged that the land was never a part of "Palo Alto Lake" and never was embraced therein, and that the decisions of the U. S. Supreme Court referred to did not apply to the case; also to his letter dated November 12, 1890, transmitting the application of W. L. Hemphill and others (which was informal), for the survey of the land, and to office letter "E" of December 3, 1890, addressed to him in reply.

It was further stated in said letter to you of May 3, 1892, that:

"In view of the foregoing and the details expressed in official letter "E" to you of April 9, 1892, I can only add for Mr. Cory's further information that it is apparent that the land to which he refers is embraced within the area of the lake as *represented* upon the official plat, and as the lands bordering upon the lake have long since been disposed of by the Government in accordance with the official plat, this office is debarred, under the decisions of the U. S. Supreme Court, referred to in said

letter "E" to you of April 9, 1892, from taking any action looking to the survey and disposal of such land."

The lake is situated in townships 96 and 97 north, ranges 34 and 35 west, 5th P. M., Iowa. It is not, however, designated on the plats by name. It covers, according to the official plats parts of sections 5 and 6 of township 96 north, range 34 west; sections 19, 20, 29, 30, 31 and 32 of township 97 north, range 34 west; sections 1, 2, 11, 12, 13 and 14 of township 96 north, range 35 west and sections 25 and 36 of township 97 north, range 35 west, 5th P. M., Iowa.; a narrow portion of the lake extending into section 18, T. 97 N., R. 34 W., 5th P. M., Iowa, does not appear to have been meandered and segregated from the public domain; neither does that narrow portion thereof which, according to the official plat extends into sections 26, 27, 28, 35 and 36, appear to have been meandered, consequently, according to the record, it has been disposed of by the Government with the legal subdivisions of the sections within which it is situated.

The records in this office further show that lots 1, 2, 3, 4 and 5 of section 19, lots 1, 2, 3, 4, 5, 6, and 8 of section 29, lots 2, 3, 4, 5 and E. ½ NW. ¼ section 20, township 97 north, range 34 west, and lots 2, 3, 4 and 5 and NE. ¼ NW. ¼, SW. ¼ of NW. ¼ and NE. ¼ of NE. ¼ of section 25, township 97 north, range 35 W., Iowa, bordering upon said lake, were patented to the State as swamp and overflowed land on May 15, 1862, Patent No. 2.

It will be noticed that in the copy of the decision by the Supreme Court of the State of Iowa, reference is made *only* to that portion of the land in question in section 19, township 97 north, Range 34 west, 5th P. M., Iowa, situate east of said lots 2, 3, 4 and 5 of the section, which lots are shown by the records in this office to have been patented to the State as swamp and overflowed lands. It is stated therein that the plaintiff, Eaton, claims to be the owner of lots 1 to 5 inclusive "by a proper line of conveyances from the Government down to James Grant, deceased, and by a contract of purchase from said Grant dated April 1, 1890." * * That "before he made his contract with Grant he entered on that part now in dispute, without any authority from any one, and broke up and put some of the land in cultivation," and that "after he made his purchase of the lots, he claimed the whole of the section, because he was the owner of the lots, and they were bounded on the east by the meandered line, and he had the right to the land between the meandered line and the waters of Lost Island and Mud or Palo Alto Lakes. A large number of witnesses were examined with reference to that part of the section which is platted as under water. We will not set out the evidence in detail. It appears from a very decided preponderance of evidence that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the witnesses testify that

the inlet of Mud Lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land upon which to base a meander line." * * * * * * * * * *

"Mud Lake" like "Palo Alto Lake" is not shown upon the official plats. They simply show one meandered lake of considerable size, in the locality above described.

The State Supreme Court in speaking of the meander line also says that: "It is well understood that a meandered line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water and to follow the windings of the stream or lake and the sinuosities of the banks. In such case, and where it appears that the government intended to sell all the land, to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant to the water's edge. Kraut vs. Crawford, 18 Iowa, 549. But no such condition is found under the evidence in the case at bar."

"There is not now and has not been, any body of water upon which to locate a meandered line." * * * * * * * * * *

It thus appears that while the evidence before the State Supreme Court seemed sufficient to satisfy it that there was no water in section 19, T. 97 N., R. 34 W., 5th P. M., before or since the subdivisional surveys in the township in 1857, it also appears that there is at the present time some water within the meandered lines of said lake as established by the deputy surveyor in 1858, for as above stated the court, on page 2 of the copy of decision submitted, in speaking of the claim of Eaton to land east of the meander line in section 9 says that, "he claimed the whole of the section, because he says he was the owner of the lots and they were bounded on the east by the meandered line, and he had the right to the land between the meandered line and the waters of Lost Island and Mud or Palo Alto Lakes."

In the conclusion of the decision the court holds that said land in section 19 east of the meander line of lots 1 to 5 inclusive, and shown by the official plat to be covered by water "is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular government methods adopted by the general government of the disposition of the public lands." But, possibly this decision is not final, and the matter yet remains to be decided by a higher tribunal, namely, the U. S. Supreme Court.

In the case of Hardin vs. Jordan, 140 U. S., 401, reference is made to the cases of Davis vs. Weibbold (139 U. S., 507), and Moore vs. Robbins (96 U. S., 530, 533, 534), wherein the question as to the previous disposal of the lands was acted upon. It was held in the decisions that "if the lands had been previously disposed of the Department has no jurisdiction over them." Mr. Justice Miller, speaking for the court, stated as follows:

"With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. . . . ."

In the case of Mitchell vs. Smale (140 U. S. Reports, 413) referring to the practice by the Government, heretofore prevailing, of making new surveys and grants of the beds of lakes, after selling and granting the lands bordering thereon, *or represented so to be*, the following definition of "*an official plat of survey*" is given, viz:

"The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow."

In view of the foregoing and in view of the decisions by the U. S. Supreme Court, this office again declines to entertain an application for the survey of *any* land which may exist within the meander lines of said lake, to the end that it may be disposed of by the Government as public land of the United States, and cannot therefore, recommend any legislation which may affect the interests of the adjacent land owners to said land; hence I deem it inexpedient to suggest any form of bill to be offered in Congress, with regard to the subject, as requested by you.

The papers received with your letter are returned herewith.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.

A certified copy of this decision is filed with the clerk.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 6 1905
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

NO. 175.

GEORGE SCHLOSSER, *Plaintiff in Error,*

—vs—

W. L. HEMPHILL, RICHARD RYAN, AND PALO ALTO COUNTY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

POINTS AND INDEX BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

POINTS AND INDEX BRIEF FOR PLAINTIFF IN ERROR.

By CHAS. A. CLARK.

I.

This suit involves the south half of a certain section 2 in Palo Alto County, Iowa.

The plaintiff below, who is plaintiff in error here, by his petition in equity specially sets up and claims title to the land under and by virtue of a certain patent issued by the Government in 1874 to one Anthony, his remote grantor.

This patent conveyed to Anthony two meandered lots along the south line of the section, "according to the official plat of the survey of said land returned to the General Land Office by the Surveyor General, * * * with the appurtenances thereof unto the said John A. Anthony, and to his heirs and assigns forever." (Record p. 120.)

These lots front on a non-navigable lake on the north; they are a portion of a tongue of land extending into the lake

about a mile at the time of the government survey in 1855 and 1857; this lake was meandered out as shown by the government plats and field notes, the meander line on the north of the Anthony lots extending from a point on the west line of the section to a point on the south line near the southeast section corner. (Record p. 11.)

On the face of the plat and field notes, the lake on the north was clearly a natural object constituting the northern boundary of the lots.

Plaintiff's title to the two lots, while formally put in issue, was sustained by the court below, and does not admit of question. The real controversy is as to the legal effect of the Anthony patent as to riparian rights and title along and in the lake.

II.

Title under this patent as far north as the shore of the lake with accretions and relictions is clear. Title to the center of the lake, which would include the claimed south half of section 30, depends upon the law of Iowa. There is no statute of the state which in terms affects the question. Plaintiff asserts that the Supreme Court of Iowa never has decided this common law question, and that this court will therefore follow its own decision in Hardin vs. Jordon, 140 U. S., 371, which carries title under the patent to the center of the lake.

Anthony entered the lots as a homestead in 1869. His patent was issued under that entry. He and his grantees, including plaintiff, have always maintained the riparian rights and title now claimed. In 1893 a certain "squatter" went upon the land between the meander line and the lake, claiming it as government land subject to homestead entry. Schlosser promptly brought suit to establish his title and it was sustained by the Supreme Court of Iowa by a decision rendered December 13, 1895.

Schlosser vs. Cruickshank, 96 Ia., 414.

From 1890 to 1894 efforts were made to secure action by the Land Department allowing homestead entries, by ordering a re-survey, or by preparing a bill to be presented to Congress, but that Department steadily and consistently held that having patented the lands under the public surveys it was without jurisdiction and could sanction no further action in the matter. (See decision of Commissioner, of Aug. 27, 1894, printed and filed with Brief of plaintiff in error herein.)

The record shows that in 1898 Mr. E. B. Evans entered into a contract with Palo Alto County for a survey and selection of swamp land in Sections 29 and 30, for an undivided half interest to all swamp lands thus secured. (Record p. 89.)

Mr. Evans had been Register of the United States Land Office at Des Moines, Iowa, from May 29, 1894, to June 30, 1897. (See Brief p. 71.)

Thereafter, June 25, 1898, the Secretary of the Interior approved a re-survey of lands in section 30, including the land in controversy, and lands in other sections. Under this re-survey three lots on the south half of section 30 were selected and patented to the State and County as swamp land. These lots defendant Hemphill claims under quit claim deed from Evans and executory contract with the County.

Two lots of the re-survey of south half of section 30 containing 101 acres were entered by defendant Ryan as a homestead September 19, 1899. (Record p. 5.) This is the land laying between the meander line of plaintiff's lots and the shore of the lake to which the Supreme Court of Iowa quieted plaintiff's title in Schlosser vs. Cruickshank, *supra*.

The record shows (page 78, exhibit 23,) that Ryan's application to enter these lots as a homestead was made August 30, 1898, and that he was represented by Mr. E. B. Evans. It may probably be safely assumed that it was a part of the same speculative venture shown by Mr. Evans' agreement with Palo Alto County relative to securing swamp lands.

It will be seen at a glance that the question for determination is as to the legal effect of the Anthony patent which had its inception in 1869, as against this speculative venture, having its inception in 1898.

III.

As to the land between the meander line of plaintiff's lots and the shore of the lake, that falls within the rule tersely stated in French-Glenn Company vs. Springer, 185 U. S., 54: "*the plats are conclusive as to the meander line, and if there was a lake abutting on or to the north of these lots, the plaintiff in error would take all land between the meander line and the water, and all accretions.*"

The court below admitted the existence of the lake and said: "The meandered lake which gives rise to this controversy is called Mud Lake, and as must be manifest from what we have said *lies north of plaintiff's land.*" * * * * "He does not seek to extend his north line to the shore of the lake, but to the half section line, which did not appear on the original plat, for with the exception of a very small tract on the northwest corner of the section, *the lake was shown to cover that whole sub-division outside of plaintiff's two lots.* The half section line certainly does not mark the shore line of any body of water at present or heretofore existing. If we were able to find now, as was done in the former action brought by this plaintiff, that a tract of land lay north of and between the meander line and

an existing permanent lake proper to have been meandered, we might perhaps reach a conclusion on the facts in harmony with our former opinion, but the evidence before us precludes this. The south shore of the body of water such as it was, is far south of the half section line according to all the testimony." * * * "The fact that plaintiff claims beyond the shore line when taken in connection with the testimony going to show that the *greater part* of such body of water was but temporary in character, is sufficient to convince us that no meander line should ever have been run here." Record 127-8.

That there was a lake to the north of the lots at the time of the government surveys in 1855 and 1857, and that it remains there today, is conclusively shown.

See Decision Commissioner, Appendix p. 5, for full description of lake.

And see brief pp. 45, 53.

Field notes and plat of original survey have effect of deposition, and they are uncontradicted. Brief pp. 75-76.

Presumption from these after sales by government based upon them, and after long lapse of time, is conclusive.

This being so, how can plaintiff be deprived of the land between the meander line and the shore of the lake covered by Ryan's homestead entry? The court below accomplished this end by holding that this land had been patented *under the swamp land grant*, pursuant to the Barber re-survey of 1898.

The court below, in its statement of the case, sets forth that under the re-survey are claimed "lots 12 and 13 by defendant Ryan. These claims are founded upon conveyances from Palo Alto County under a patent issued to the state under the Swamp Land Grant of 1850, and which is based upon the re-survey of 1898." (Record p. 126.) Its decision giving Ryan the land between the meander line and the shore of the lake is based wholly upon the Swamp Land Grant, and nothing else.

As to Ryan, there is no such issue in the case. He claims solely and only under a homestead entry. (See his answer with exhibits 2 to 5). Furthermore, the lots claimed by Ryan were not reported as swamp under the re-survey (Record p. 18.) and there is no pretense anywhere in the record that they were swamp land, or were ever patented as such.

As to this, the court below simply framed an issue and decided it with no semblance of fact, and, it might be added with no semblance of law, upon which to base its decision.

IV.

Having embarked on this sea of error, it seems to have been easy to frame other issues not made by the parties themselves as grounds for depriving plaintiff of the land claimed

by Ryan between the meander line and the shore of the lake.

The plaintiff specially set up that "said lots were meandered by the government surveyor, *and said meander lines run with reference to a lake then existing* in part upon said section and the plat as made by said surveyor and filed for record as aforesaid, shows the meander line to coincide with the shore line of the said lake and shows no reservation between said meander line and the lake; that subsequent to the filing of said survey and plat the United States sold said land and issued patent thereto to one John A. Anthony; that by mesne conveyances the land has been transferred to this plaintiff; plaintiff purchased said lots relying upon the fact that the Government had platted and sold said lots without any reservation between the meander line and the lake." (Record p. 1.)

As to this Ryan said in his answer, and he said nothing more: "The defendant denies that such meander lines were run with reference to a lake *then existing* in part upon section 30, Township 97, Range 34." (Record p. 2, bottom.)

No question was raised as to whether the lake then existing was permanent; nor whether it was "proper" or "necessary" to be meandered if it did exist at the time of the survey.

The one question presented for determination was *whether the lake did or did not exist at the time of the survey.*

If it existed, but was wrongfully meandered, either because too shallow, or because temporary, or because of gross fraud or error as to its location, or if the meander line was not correctly run, that was matter in avoidance of a definite portion of the description and boundaries of the grant from the government under which plaintiff claimed, and should have been distinctly set up in avoidance, and sustained by distinct proof.

Brief, Div. IV, p. 21 to 23; also pp. 53-4.

Nevertheless, the court below in addition to setting up for Ryan a supposititious issue as to the swamp land grant, also set up for him other issues equally foreign to the pleadings.

1. That the lake was not proper or necessary to be meandered.

2. That the meander line was not correctly run.

If these matters had been set up by defendant's answers, plaintiff would have been entitled by demurrer to have tested their sufficiency as matter of law.

It must then have been held that his title under the Anthony patent could not be collaterally assailed as to these matters for,

1. Whether proper or necessary to meander the lake was confided to the discretion of the surveyor in the field, and

that discretion as thus exercised was approved by the land department. On this record, which stood unquestioned for thirty-three years and was over and over again upheld by the department, the government sold lands and granted titles. That this could not be called in question as to such discretionary matters, see Brief pp. 48 to 52. And see opinion of Mr. Justice Field in Knight vs. Land Association, 142 U. S., 205-6, and 211-12 quoted, Brief p. 75.

2. If the clear rule of law as to this had been disregarded, then plaintiff would have been entitled to call for distinct proof, *directed to the time when the survey was made*, to show that it was not necessary or proper to meander the lake, or that the meander line was not correctly run; and he would have been entitled to an opportunity to introduce proof on his part to sustain the survey (which shows upon it face the absurdity of such issues to impeach public surveys in matters of discretion), and he would also have been entitled to be heard in argument in the trial court and the Supreme Court as to the sufficiency of the evidence and the rules of law as to these questions. Of all these rights he has been denied. The assumption of trying such issues is nothing less than farcial—but does it become any less farcial when the appellate court injects such suppositious issues into the case for the first time, adopts its own conjectures as evidence, and, without hearing or argument, deprives plaintiff of his landed estate upon the potentiality issues which might have been raised but were not?

And finally, if it be conceded that these collateral issues against the Anthony patent could be made, and that they might for the first time be raised in the Supreme Court by that learned tribunal itself, it is still established beyond doubt that the lake was proper and necessary to be meandered and that the meander line was "correctly run". For the only evidence of conditions at the time of the survey is the field notes and plats, which, as we have seen, are entitled to the weight of a deposition. The long lapse of time gives great additional weight to these ancient muniments of title. There is no conflicting evidence in the case—nothing which may not be harmonized with the plats and field notes when lapse of time and conditions changed by the industry of man are considered.

Mud Lake was then a part of the single lake extending into four townships. See letter Secretary of Interior, Record p. 75, Brief pp. 44 and 45 and Barber re-survey there quoted. Also decisions of Commissioner, App. 5. "Mud Lake is not shown upon the official plats. They simply show *one meandered lake of considerable size* in the locality above described." App. 6.

The west line of section 30 was surveyed in 1855—*a dry year*. Brief 14, Record 33. Then a meander post was set on south side of the lake, and 42.88 chains north a like post was set

on the north side of the lake. Record 120-121. Brief 5. The lake was therefore 171.52 rods wide at that point.

At the time of the Barber re-survey in 1898 the same width was shown by the re-survey. Brief 7, Plat, Record 73.

The other lines of section 30 were surveyed in 1857. That was a wet year. Brief 14 and 15, Record 53. The whole section except the Anthony lots on the south side and a meandered lot in the north-west corner was then covered by the lake which extended south upon section 31 and 32. See plat, Record 11, Field notes, Brief 6 and Record 56, 113 and 121.

The Barber re-survey shows that a rise of two feet in the lake would submerge the same portion of section 30 in 1898. Brief 7, Record 81. And the witnesses show without conflict that the lake had at that time receded more than 3 feet since earlier days. Brief 15, Record 15 and 46.

There is, hence, no ground in the record to warrant the legal conclusion that in 1855 and 1857 the lake was not proper or necessary to be meandered.

But the decision below illustrates what will happen if the courts on their own motion and surmise, forty years after the event, may review the discretion excercised in making government surveys.

V.

The attempt to abrogate plaintiff's title to the land between the meander lines and the lake is not only outside the pleadings, but it is in direct conflict with numerous controlling decisions of this court which hold that the meander line is conclusive and can not be set aside or called in question. See cases Brief 20 and 52.

Even in the case of a fictitious and fraudulent survey th meander line laid down is conclusive.

Security &c. Co. vs. Burns, 193 U. S., 182.
Brief 63, bottom.

The only question is whether the meander line is a boundary or whether a natural object with reference to which it is run is the true boundary. It is uniformly held by this court and there is not a case to the contrary in its decisions, that where a lake, river, or body of water is meandered, such natural objects, and not the meander line is the true boundary. And this rule has been many times declared by the Supreme Court of Iowa. See cases Brief 21.

Schlosser vs. Cruickshank, 96 Iowa, 18.
Quoted Brief 51, 58 to 60.

The case of Mitchell vs. Smale, 140 U. S., 412, 413, 414, is very persuasive in this case. There, as here, it was contended

that a tongue or protruberance of land extending into the meandered lake warranted a re-survey and subsequent patent depriving the original riparian patentee of the land. Quoted, Brief 61, 62.

Speculators, as land increased in value, to start vexatious litigation, if such attacks are sanctioned, were foreseen by the prophetic eye of this court. In this case they have ceased to be prophecy. They are here making the very attack denounced in the Mitchell case.

The re-survey and attempted disposition of the land there under are absolutely void acts.

Cases Brief, 24, 25, and 61.

The cases cited in the opinion of the court below, Record p. 128, as authorizing the re-survey under which defendants claim hold precisely the reverse of the proposition.

Cragin vs. Powell, 128 U. S., 691, holds

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, *whilst the lands are subject to the supervision* of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." (pp. 698-699.)

"It is conceded that this power of supervision and correction by the Commissioner of the General Land Office is subject to necessary and decided limitations. Nor is it denied that, when the Land Department has once made and approved a governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in proper office,) and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the government *against the interferences or appropriations of corrective re-surveys made by that department subsequently to such disposition or sale.*" (pp. 699-700.)

It was pointed out in that opinion that the Land Department itself refused to make re-surveys conflicting with interests in lands already sold and patented. (Ib. 698.) And such was the rule maintained by the Department as to the survey of the very land in controversy in this case. (See App. pp. 3, 4, 5 and 7.) The re-survey in Cragin vs. Powell was accordingly held void, and the bad faith and speculative venture in such re-survey were fittingly condemned by this court.

So in, Michigan L. &. L. Co. vs. Rust, 168 U. S., 595, it was said, quoting New Orleans vs. Paine, 147 U. S., 261,

"*Until the matter is closed by final action*, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon final hearing."

And it was added by this court;

"It was within the power of the land Department, *at any time prior to the issue of a patent*, of its own motion, to order a re-survey, and correct by that any mistakes in the prior survey."

Niles vs. Cedar Point Club, 175 U. S., 300,

Is a case where it was held that the meander line was a boundary line and that the lands beyond it did not border upon a body of water and were therefore excluded from the patent, and no rights thereto having passed under the patent, that they were subject, not to re-survey, but to survey and sale as lands undisposed of belonging to the United States. (See Brief, p. 64.)

There was no possible ground therefore for depriving plaintiff of the land between the meander line and the shore of the lake which was held by the Supreme Court of Iowa to belong to him in the case of Schlosser vs. Cruickshank, supra.

VI.

There remains the question as to whether the Anthony patent conveyed title not only to the shore of the lake, but to the center of the lake.

This question of riparian ownership is a common law question to be accepted here as decided by the State Supreme Court.

See cases, Brief 55, and especially latest statement of the rule by this court in Hardin vs. Shedd, 195 U. S., 518-19, there quoted.

As there declared, the land under the lake belonged to the United States when the grant under the Anthony patent was made. The rule does not mean that the beds of such lake passed to the State on its admission to the Union, "but is simply a convenient, possibly the most convenient, way of determining the effects of the grant."

This common law question of the effect of a grant from the government fronting upon a non-navigable lake, never has been decided by the Supreme Court of Iowa, and hence the common law as declared by this court in Hardin vs. Jordon, 140 U. S., 371, and subsequent cases, must govern this court in the case at bar.

While there is no express statute of Iowa governing riparian rights, or declaring the common law with reference thereto, yet certain statutes of Iowa would seem to result in giving effect to that rule, as held in Hardin vs. Jordon, *supra*, and in carry-

ing title under the Anthony patent to the center of the lake. Thus by section 2 of the Revision of Iowa of 1860, bringing forward the like provision in a prior code, it was provided:

"The state possesses sovereignty co-extensive with the boundaries referred to in the preceding section, subject to such rights as may at any time exist in the United States, *in relation to the public lands*, or to any military or naval establishment within the above limits."

And by section 2209 of the revision, bringing forward section 1201 of a prior code it was provided;

"Every conveyance of real estate passes all the interest of the grantor therein unless a contrary intent can be reasonably inferred *from the terms used*."

These provisions were carried forward as respectively, section 2 and section 1931 of the 1873 Code of Iowa.

And they still remain the statute law of Iowa.

Code of Iowa, 1897, section 2 and 2914.

Furthermore section 6 of the Act of Congress, approved March 3rd, 1845, for the admission of the state of Iowa into the Union distinctly specifies in paragraphs, 1, 2, 3 and 4 what lands belonging to the United States shall be vested in the State of Iowa and paragraph 5 of that section provides,

"That the five foregoing propositions (as to public lands) herein offered are on the condition that the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide by an ordinance, irrevocable without the consent of the United States, that *the said state shall never interfere with the primary disposal of the soil within the same by the United States*, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers thereof."

The legislature of Iowa by act approved January 15, 1849, accepted these provisions and provided "that the state of Iowa *will never interfere* with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof."

At the time of the Anthony patent the "*land under the lake as well as that surrounding it belonged to the United States.* * * * * "In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general laws of the state so far as its conveyance are concerned." * * * * "The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passes to the state on its admission, or otherwise, apart from the swamp land act, but is simply a con-

venient, possibly the most convenient way of determining the effect of a grant."

Hardin vs. Shedd, 190 U. S., 518-19.

It is therefore difficult to see, under the fundamental law of Iowa on its admission into the Union, as well as under its general statute law, how title to the center of the lake which was in the United States when the Anthony patent was issued failed to pass to Anthony under that patent.

But be this as it may, nothing short of an express and distinct decision of the Supreme Court of the state with the fundamental law of Iowa and the statute law of Iowa standing as it does can limit the legal effect of the patent under which plaintiff claims in the case at bar.

There is no such decision of the Supreme Court of Iowa. Any claim of such decision will probably be based upon

Noyes vs. Collins, 92 Iowa, 567-8-9, and
Noyes vs. Board of Supervisors, 104 Iowa, 175.

Those were both cases where a county in Iowa had taken title from the Government to a certain section 15 under the swamp land grant. A portion of the lake bed in controversy was a part of this section 15. The conflict was between grantees of the county or between the county and its grantee. It appeared that the county, notwithstanding the sale of lots along the shore of the lake, holding title as it did to the bed thereof, had, "from time to time for many years, surveyed portions of these lake beds and has platted the same in lots and sold said lots to various parties."

It was held in the first of these cases, the land having been sold by metes and bounds, one line of which was "by the meanders of said Dry Lake to the south line of section 15," that the meander line was a boundary line under the facts and circumstances of the case.

Apparently the court held the description "*by the meanders of said Dry Lake*" to be a boundary line, and a limitation upon the extent of the grant from the county, citing Murphy vs. Copeland, 58 Iowa, 409. That was a case where the description held to be a boundary and a limitation of the grant was "*up the west bank of Pine Creek.*" When that case was first before the Supreme Court of Iowa that court said:

"If the *banks* of a creek can be regarded as extending to the *middle*, so that the words "up the west bank" mean the same as the words *up the east* bank would, then the words *west bank*, as a call in the deed loses all significance. * * * * The words *up the west bank*, taken in their common import, do necessarily mean that the stream was excluded."

Murphy vs. Copeland, 51 Iowa, 516.

So, by like reasoning, "*by the meanders of Dry Lake,*" would exclude the lake, and that seems to have been the real ground of the decision of the Noyes-Collins case. The difference between such a description and that of the Anthony patent, "lots two and three of section thirty * * * * according to the official plat of the survey of said land * * * with the appurtenances thereof" is obvious.

The citation of the Wisconsin case, Deitrich vs. Ry. Co., 42 Wis., 248, and the quotation from it, "The rule that the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore appears to be very generally—almost universally—recognized," decides nothing. This was dictum in the Wisconsin case as to non-navigable lakes and ponds, for that case involved riparian rights on Lake Michigan, and involved nothing else; and it was equally dictum in the Noyes-Collins case beyond the exact facts of that case. It seems idle to claim that a question of private grant, decided on a peculiar boundary, and special facts, can determine the effect of a government patent as to title in the bed of a non-navigable lake, where it is certain that title to the bed of the lake passes under the patent, and the only question is whether the *patentee* takes such title.

Noyes vs. Board simply follows the Noyes-Collins case, as declared by the court at the end of the opinion.

For these two cases see Brief, pp. 29-30.

The real point of these two decisions is that in both cases the meander lines were held to be lines of limitation and of boundary. In neither case did plaintiff take to the shore of the lake, and in neither case does it appear that the meander lines and the shores of the lake were identical.

Nor do other decisions of the Supreme Court of Iowa decide the question under discussion.

Rood vs. Wallace, 109 Iowa, 8 to 14, was a case where the court expressly declared that the rights of no riparian owners were involved, but that no re-survey could prejudice their interests, (9 and 10). (Brief pp. 31 and 32.)

Carr vs. Moore, 119 Iowa, 152,
Grant vs. Hemphill, 92 Iowa, 218,

are cases where it was held there were no bodies of water to meander. (Brief pp. 33 to 37) and in both cases it was held that "the government patents did not confer any ownership beyond the meander line." (p. 159, Carr vs, Moore.)

Schlosser vs. Cruickshank, 96 Ia., 425,
Ladd vs. Osborne, 79 Ia., 93,

are cases where plaintiffs claimed land between the meander line

and the shore of the lake, and got it. Nothing more was involved. (Brief p. 37.)

These cases summarized. (Brief 39 to 44.)

In two of the latest of these cases, Carr vs. Moore, and Ogden vs. Buckley, the question of title to beds of lakes in Iowa is treated as open and undecided. (Brief p. 38.)

The theory propounded *arguendo* in Rood vs. Wallace, 109 Iowa, 14, that if the public survey "is conclusive it amounts to a segregation of the lakes and river beds from the public domain, and, as a general rule, confirms title thereto in the state," need not be discussed. This theory is not a decision; it is not even dictum; it is directly in conflict with the decision of this court that "the rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passes to the state on its admission, or otherwise, apart from the swamp land act."

Hardin vs. Shedd, 190 U. S., 519.

There being, then, no decision of the Supreme Court of Iowa as to what the common law rule is touching title to beds of non-navigable lakes, and as that question must be decided in the case at bar, it seems to follow inevitably that this court will follow its own decisions as expressed in Hardin vs. Jordon, *supra*, and subsequent cases.

VII.

The swamp land grant was long prior to the Anthony patent. If any portion of the lake meandered out in front of these Anthony lots was in fact swamp land under the intent and meaning of that grant, it may be conceded that it might in apt time have been claimed and secured by title superior to that under the patent. The public survey showed the land to be lake, and not swamp. The Anthony patent was an adjudication by the Land Department that the land was not swamp in fact. *Prima facie* it conveyed title to the center of the lake. See Brief pp. 64 to 66, and cases Ib.

Section 30 was fully surveyed. The corner posts and quarter post were set, so that lands therein might have been claimed as swamp at any time after the survey' There was, hence, neither necessity nor power to make a re-survey upon which to base the swamp land claim set up in the case at bar.

Cragin vs. Powell, 128 U. S., 691.

And it has been so decided by the Department as to this very survey. (See decision, App. herein, and Brief 66, 67.)

The county of Palo Alto, in fact, made its selections and included therein more than twenty sections in the township

where the land in controversy is situated, but it included no lands in section 30. (Brief pp. 67 to 69.) This is shown by the report of the register of the state land office of Iowa for the year 1875, of which report the courts take judicial notice. (Cases, Brief pp. 70, 71.) Selections after 1864 were barred by act of Congress of March 12, 1860. (Brief pp. 72 to 74.)

And in any case the swamp land claim was barred by *laches* in its assertion both under the decision of this court and those of the Supreme Court of Iowa. (Brief pp. 76 to 79.)

McCormick vs. Hayes, 159 U. S., 348, and Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559, are submitted as persuasive and conclusive authorities on this question.

The attempted selection of the lands in section 30 as swamp in 1898 was an after-thought based upon the speculative venture with Mr. Evans, and will not be looked upon with favor by a court of equity. (Brief pp. 71-72, and cases there cited.)

The re-survey upon which both the homestead claim of defendant Ryan and the swamp land claim of defendant Hemphill are founded is void, and can in no manner affect the rights and title of plaintiff under the Anthony patent. (Brief pp. 58 to 64, and cases there cited.)

VIII.

As to jurisdiction. Questions arising under the swamp land grant are the same as those considered by this court, and upon which the judgments of the Supreme Court of Iowa were reversed in,

> McCormick vs. Hayes, 159 U. S., 348,
> Rogers Locomotive Co. vs. Am. Emigrant Co., 164 U. S., 559.

All of the questions involved in the case at bar are as to the legal effect of the Anthony patent specially set up and pleaded by plaintiff in error. The decision below was against his claims thus made, and in precisely similar cases the jurisdiction of this court has been maintained. Brief pp. 81 to 84, and cases there cited.

There was no finding of fact which disposed of the case below without reference to the Federal questions involved. Brief pp. 80, paragraph 3, and 84 to 87, and cases there cited.

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